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No. _____

In The

Supreme Court of the United States

October Term, 1995

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

LARRY D. VANCE,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the decision of the Supreme Court of Ohio conflict with this Court's decision in *Consolidated Rail Corporation v. Gottshall*, 114 S. Ct. 2396 (1994), by holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress caused by general working conditions?

2. Does the decision of the Supreme Court of Ohio conflict with this Court's decision in *Consolidated Rail Corporation v. Gottshall*, 114 S. Ct. 2396 (1994), by holding that there is a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress caused by a hostile working environment?

3. Did the Supreme Court of Ohio err in holding that a railroad employee has a cause of action under the Federal Employers' Liability Act for the negligent infliction of emotional distress arising from general working conditions or a hostile working environment if the railroad employee is able to plead any discrete incident that conceivably could give rise to a claim for emotional distress caused by being placed in the zone of danger of physical impact?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner, Consolidated Rail Corporation, is a privately held corporation that is owned by Conrail Inc., its publicly held parent corporation. Consolidated Rail Corporation has an ownership interest in the following companies: Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railroad Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; and Trailer Train Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

Respondent, Larry D. Vance, is an individual.

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PETITION FOR WRIT OF CERTIORARI

Just over one year after this Court's decision in *Consolidated Rail Corporation v. Gottshall*, 114 S. Ct. 2396 (1994), the highest court of one of the states has rendered a decision that directly, fundamentally, and irreconcilably conflicts with this Court's decision. In *Gottshall*, this Court held that only those plaintiffs who fall within the zone of danger of physical impact may recover damages for the negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"). Moreover, the Court specifically and expressly held that a "work-stress-related claim plainly does not fall within the common law's conception of the zone of danger." *Gottshall*, 114 S. Ct. at 2411-12.

In direct contravention of the express directive of this Court, the Supreme Court of Ohio held that a railroad worker could recover damages for the negligent infliction of emotional distress arising from a working environment the court characterized as "hostile." In the case for which certiorari is sought, the plaintiff, Larry D. Vance, complained that his superiors and co-employees subjected him to "torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule, and other severe emotional distress" (A. 3). Vance identified two types of incidents that allegedly caused his emotional distress: (1) numerous incidents of teasing, cruel jokes, and general hostility towards him that created an unpleasant working environment but that did not involve the threat of a physical impact; and (2) two incidents involving the threat of a physical impact (a fellow employee came at

him with a chipping hammer and a fellow employee attempted to run him over).[1]

The Supreme Court of Ohio held that Vance could recover under the FELA for emotional distress arising from the entirety of his working conditions, including the multiple incidents that involved no threat of physical impact. By permitting recovery for non-compensable injuries arising from stressful working conditions that do not place the railroad worker in the zone of danger of physical impact, the Supreme Court of Ohio violated the clear holding of this Court and did precisely what this Court in *Gottshall* held could not be done – it took "the radical step of reading FELA as compensating for stress arising in the ordinary course of employment." *Gottshall*, 114 S. Ct. at 2412.

The fundamental import of the Ohio court's decision is that in FELA negligent infliction of emotional distress cases based on hostile or stressful working conditions, all the plaintiff need do to circumvent this Court's holding in *Gottshall* is to allege one single incident that placed the plaintiff in the zone of danger of physical impact. Under the Ohio court's decision, by so doing the plaintiff then magically becomes entitled to recover damages for emotional distress arising out of circumstances that this Court

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[1] The Supreme Court of Ohio enumerated a third incident that it believed involved the threat of a physical impact, that safety devices were denied to Vance. While it is quite doubtful that the denial of safety devices could constitute a physical impact or the threat of a physical impact so as to satisfy this Court's zone of danger of physical impact test, resolution of that issue is not necessary to decide this petition for certiorari.

in *Gottshall* specifically and expressly held do not give rise to a negligent infliction of emotional distress claim under the FELA.

OPINION BELOW

The opinion of the Supreme Court of Ohio in *Vance v. Consolidated Rail Corporation* is reported at 652 N.E.2d 776 (1995) and 73 Ohio St. 3d 222 (1995). The Supreme Court of Ohio reversed the decision of the Court of Appeals of Ohio, Eighth District, Cuyahoga County, appearing at 1993 WL 462871 (Nov. 10, 1993), in which the Ohio Court of Appeals had vacated the jury verdict for Larry D. Vance and entered judgment for Consolidated Rail Corporation.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Ohio in *Vance v. Consolidated Rail Corporation* was entered on August 16, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or

between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Larry D. Vance began his employment with the Erie Lackawanna Railroad in 1968. When the Erie Lackawanna merged with six other railroads, one of which was Penn Central, to form the Consolidated Rail Corporation

("Conrail") in 1976, Vance became a Conrail employee. A byproduct of the merger was some animosity among the employees of the various railroads that had joined together. As a former Erie employee, Vance was subjected to name-calling, teasing, hostility, and other such behavior at the hands of former Penn Central employees, which created an unpleasant working environment and caused him emotional distress. In 1990, Vance filed an FELA action against Conrail for negligent infliction of emotional distress, alleging that Conrail's negligent supervision of its employees allowed the employees to commit intentional acts that caused him emotional distress.

The crux of Vance's allegations are set forth in paragraph 5 of his Complaint, which provides in full as follows (A.3):

> The severe emotional distress and resulting injury were directly and proximately caused by Defendant Railroad. It negligently supervised and condoned the known conduct of Plaintiff's superiors and fellow employees who in the process of making work assignments and in other work related associations, subjected Plaintiff to torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule, and other severe emotional distress, because he was a former employee of Erie Lackawanna Railroad. This outrageous conduct throughout Plaintiff's employment relationship ultimately caused Plaintiff's said emotional breakdown and disqualification from his job, all of which was reasonably foreseeable by Defendant Railroad.

At trial, Vance testified about specific incidents in which he was allegedly harassed for being a former Erie employee. As summarized by the Court of Appeals of Ohio, the "[t]estimony supported an overall atmosphere of animosity directed at former Erie employees by former Penn Central employees" (A.40). The specific instances of harassment of which Vance complained were as follows:

- Vance was called names by his co-workers, such as a "scab." The words "Erie Scab" were key-scratched into the paint of his truck.
- Former Penn Central employees would attempt to provoke fights with former Erie employees in the lunchroom.
- Vance was shoved by a former Penn Central employee who tried to pick a fight with him in the railyard.
- Derogatory remarks about former Erie employees were written on locker room walls and elsewhere in the workplace.
- Someone broke into Vance's truck and put a dead rat into his lunch box.
- Vance was taunted about his sex life after he confided in a fellow employee about impotency problems, and his co-workers said that they were going to "take care of" his wife while he was at work.
- Vance was not assigned a locker at some work locations and thus had to change clothes in the parking lot.
- Sugar was put into the gas tank of Vance's car while it was parked in the Conrail parking lot.

- Vance was not allowed to schedule his vacations when he wanted, even though he had more seniority than those who did get their chosen vacation dates.
- Vance received an anonymous phone call at work, threatening that "you won't know what's going to hit you."
- Vance was threatened by a fellow employee with a chipping hammer in the presence of a supervisor.
- A co-worker tried to put a scare into Vance by attempting to run him over with a truck.
- Vance was not furnished with certain safety equipment.
- Vance was not properly oriented as to track layout by his supervisors when he traveled to different railyards to work.

(A.3 to A.5).

Vance also presented psychiatric testimony that he was severely depressed, that if the unpleasant incidents at work did occur they would have contributed to Vance's depression, and that Vance was medically disabled from work because of the depression (A.6). After the trial court denied Conrail's motion for a directed verdict, the jury returned a general verdict for Vance for $500,000 in damages (A.6). The trial court then denied Conrail's motions for judgment notwithstanding the verdict and for a new trial (A.6, A.65).

The Court of Appeals of Ohio vacated the jury verdict and entered judgment for Conrail, holding that Conrail's motions for a directed verdict and for judgment

notwithstanding the verdict should have been granted (A.47 to A.59). Specifically, the court held that Vance failed to prove a cause of action for negligent infliction of emotional distress because the "rough conduct and locker-room humor" of Vance's fellow railroad workers, "even if malicious and unprovoked," did not give rise to an FELA claim for emotional distress (A.51).

The Supreme Court of Ohio reversed (A.8 to A.21).[2] In a striking attempt to avoid this Court's holding in *Gottshall* that work stress claims are not compensable under the FELA, the Ohio court purported to draw a distinction between the stressful work environment claim prohibited by *Gottshall* and the "hostile" work environment claim alleged by Vance. According to the Ohio court, "[p]laintiff in this case claims that his injuries were caused by a *hostile* work environment, not merely by a *stressful* work environment" (A.15). Of course, a distinction between emotional distress arising from a stressful work environment versus that arising from a hostile work environment is entirely inconsistent with the *Gottshall* decision, and it is no doubt for that reason that hostile work environment claims such as Vance's have been rejected by every court to have considered the issue since this Court's decision in *Gottshall*.

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[2] The Supreme Court of Ohio remanded the case to the Court of Appeals of Ohio for rulings on Conrail's assignments of error unrelated to the negligent infliction of emotional distress claim that previously had not been addressed by the court of appeals (A.21). By order dated October 23, 1995, the Ohio court of appeals stayed all proceedings pending this Court's disposition of this petition for certiorari.

Perhaps even more strikingly, the Supreme Court of Ohio defended its contravention of this Court's decision in *Gottshall* by concluding that because Vance was placed in the zone of danger of physical impact by a small minority of the many incidents of hostility about which he complained, he should be able to recover damages for the emotional distress arising from the entirety of his working conditions, even though the vast majority of those conditions did not place him in the zone of danger of physical impact and therefore would not be compensable under *Gottshall*. According to the Ohio court, "[w]hile much of plaintiff's evidence went to Conrail's failure to provide an emotionally safe place to work, some of the evidence also went to Conrail's failure to provide a physically safe place to work" (A.14). Thus, because he alleged incidents that could have supported a claim for the negligent infliction of emotional distress, Vance was permitted to introduce numerous incidents having nothing to do with his fear for physical safety and to recover for the precise kind of emotional distress that this Court held is not compensable.

The concurring opinion analyzed the case under intentional infliction of emotional distress and negligent supervision theories (A.22 to A.33). The dissenting judge would have held that "Vance's claim, premised on a hostile work environment produced by sporadic, intentional incidents of harassment by various co-workers, is not cognizable for negligent infliction of emotional distress" under the *Gottshall* zone of danger test (A.33 to A.37).

REASON FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari for one central, controlling reason: the decision of the Supreme Court of Ohio below directly, fundamentally, and irreconcilably conflicts with this Court's decision in *Consolidated Rail Corporation v. Gottshall*, 114 S. Ct. 2396 (1994).

Gottshall involved two decisions of the Court of Appeals for the Third Circuit that were consolidated in this Court. In the first decision, *Gottshall v. Consolidated Rail Corporation*, 988 F.2d 355 (3d Cir. 1993), a Conrail work gang was working under intense time pressure to repair a defective track in a remote location on an extremely hot summer day. One worker, Richard Johns, had a heart attack and his friend, James Gottshall, attempted to resuscitate him while the supervisor drove for help. Johns died before the paramedics arrived. Gottshall thereafter suffered emotional distress as a result of the incident and brought a negligent infliction of emotional distress claim against Conrail under the FELA. The district court granted summary judgment for Conrail, and the court of appeals reversed.

In the second decision, *Carlisle v. Consolidated Rail Corporation*, 990 F.2d 90 (3d Cir. 1993), Carlisle was a train dispatcher who was required to work long hours with outdated equipment, instructed to ignore safety concerns, subjected to verbal abuse by his supervisor, and denied police protection when he worked in dangerous, remote locations. Carlisle suffered emotional distress as a result of his workplace stress and brought a negligent infliction of emotional distress claim against Conrail under the

FELA. The jury returned a verdict in favor of Carlisle in the amount of $386,500, and the court of appeals affirmed.

This Court reversed the judgments in both *Gottshall* and *Carlisle*. The Court adopted the zone of danger of physical impact test for FELA negligent infliction of emotional distress cases and held that: (1) only those railroad employees who "sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct" can recover for the negligent infliction of emotional distress under the FELA, *Gottshall*, 114 S. Ct. at 2406; and (2) there is no cause of action under the FELA for workplace stress.

Applying the zone of danger test to the two cases before it, the Court reversed and remanded *Gottshall* for reconsideration because the zone of danger test was not adequately briefed or argued in the Supreme Court.[3] In *Carlisle*, the Court reversed and remanded for entry of judgment in favor of Conrail.

Significantly, as to *Carlisle*, the Court expressly held that "Carlisle's work-stress-related claim plainly does not

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[3] On remand, the Court of Appeals for the Third Circuit held that Gottshall neither had experienced a physical impact nor was placed in immediate risk of physical harm. *Gottshall*, 56 F.3d 530 (1995). The court concluded that "we simply do not view the physical working conditions to be extreme and dangerous enough as to place [Gottshall] in immediate risk of physical harm." *Id.* at 535. Consequently, the court found that Gottshall was not within the zone of danger and affirmed the district court's grant of summary judgment in favor of Conrail. *Id.* at 535-36.

fall within the common law's conception of the zone of danger. . . . Without any support in the common law for such a claim, we will not take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment." *Gottshall*, 114 S. Ct. at 2411-12. And the Court further elaborated that:

> We find no support in the common law for [the court of appeals'] unprecedented holding [in *Carlisle*], which would impose a duty to avoid creating a stressful work environment, and thereby dramatically expand employers' FELA liability to cover the stresses and strains of everyday employment. Indeed, the Third Circuit's ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees. We have made clear, however, that FELA is not an insurance statute.

Id. at 2409.

In the case below, the Supreme Court of Ohio allowed recovery for the very cause of action that this Court in *Gottshall* prohibited – a cause of action under the FELA for the negligent infliction of emotional distress arising out of general working conditions. It did so by allowing the jury to award damages for what this Court has held are non-compensable injuries under the FELA based on stressful, unpleasant or hostile working conditions simply because those injuries occurred alongside an injury or injuries that may be compensable under the FELA. But the fact that certain of Vance's allegations may give rise to a cognizable FELA negligent infliction of emotional distress claim does not mean that all of his allegations do. As aptly stated by the dissent in *Vance*, "[t]he majority decision merits the same criticism the

Supreme Court leveled at the Third Circuit's decision it reviewed in *Gottshall, i.e.*, that the 'ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees' " (A.37) (quoting *Gottshall,* 114 S. Ct. at 2409).

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE SUPREME COURT OF OHIO DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *CONSOLIDATED RAIL CORPORATION v. GOTTSHALL.*

A. Vance's Work Stress Claim Is Barred By This Court's Decision In *Consolidated Rail Corporation v. Gottshall.*

The Court of Appeals of Ohio described Vance's claim of emotional distress as one resulting from "a pattern of harassment by former Penn Central employees, who made his working life miserable" (A.42). The essence of Vance's claim is that he did not get along with his co-employees: his fellow employees teased and tormented him and his employer did nothing to stop it. Because this aspect of Vance's claim falls squarely within the category of work-stress-related claims that the Court in *Gottshall* barred from FELA recovery, the opinion of the Supreme Court of Ohio permitting Vance to recover for injuries resulting from a stressful or unpleasant work environment conflicts squarely with *Gottshall.*

The Supreme Court of Ohio attempted to differentiate the facts of *Vance* and *Carlisle* by labeling *Vance* a *"hostile* work environment" case, in contrast to *Carlisle,* which it characterized as a *"stressful* work environment"

case (A.15). The Ohio court did not, however, provide any guidance as to where the line between the hostile and the stressful workplace is drawn – no doubt because there is none. Tellingly, this very point was made by the district court in *Carlisle* in its attempt to find support through pre-*Gottshall* FELA harassment cases for its holding that Carlisle's work stress claim was cognizable under the FELA. *See Carlisle v. Consolidated Rail Corp.*, 790 F. Supp. 521, 528 (E.D. Pa. 1992) ("[t]his court sees no real distinction between a negligent infliction of emotional distress claim based on harassment at the workplace, and a work-related stress claim such as Mr. Carlisle's").

The Supreme Court of Ohio rendered a decision in fundamental conflict with *Gottshall* and plainly erred in not recognizing that, as to the non physical impact type of incidents about which Vance complained, *Vance* is in the same camp as *Carlisle*, from both a factual and a policy perspective. Like Vance, Carlisle claimed that Conrail breached its duty to provide him with a safe place to work by exposing him to unreasonably dangerous conditions that threatened his emotional and physical well-being. Like Vance, Carlisle alleged that he was subjected to verbal abuse. Like Vance, Carlisle alleged that Conrail disregarded his general concerns over safety. And although Vance alleged that animosity between him and his co-employees and supervisors created a stressful working environment, whereas for Carlisle the stressful working environment was created in large part by being required to work long hours with outdated equipment, the bottom line is the same: both Vance and Carlisle had to cope with difficult and unpleasant working conditions. Yet this Court expressly held in *Gottshall* that a claim for

negligent infliction of emotional distress arising out of such working conditions is not compensable under the FELA.

Moreover, the policies underlying the *Gottshall* decision are severely jeopardized by the *Vance* decision. From a policy perspective, there is no difference between stressful working conditions and hostile working conditions. Both are departures from the FELA's "focus on physical perils," *Gottshall*, 114 S. Ct. at 2410, that was the benchmark of this Court's analysis in *Gottshall*. And both "hold[ ] out the very real possibility of nearly infinite and unpredictable liability for defendants," *id.* at 2405, as well as "the potential for a flood of trivial suits [and] the possibility of fraudulent claims that are difficult for judges and juries to detect," *id.* at 2411, that led this Court to adopt the zone of danger of physical impact test for FELA negligent infliction of emotional distress claims.

The simple fact is that – as every other court to have considered the issue since *Gottshall* has held – this Court in *Gottshall* foreclosed FELA negligent infliction of emotional distress claims based on stressful working conditions such as Vance's, whether that stress is caused by too much work, too much harassment, or anything else. *See, e.g., Dziegelewski v. Consolidated Rail Corporation*, 1995 U.S. Dist. LEXIS 1700 (S.D.N.Y. Feb. 15, 1995) (plaintiff's allegations that supervisor threw his keys on plaintiff's desk, ordered plaintiff to drive a long distance when plaintiff was exhausted, screamed at plaintiff, harassed plaintiff for filing claims about unsafe work conditions, and subjected plaintiff to malfunctioning septic system not cognizable under *Gottshall* zone of danger test); *Capriotti v. Consolidated Rail Corporation*, 878 F. Supp. 429 (N.D.N.Y.

1995) (plaintiff's being required to work long hours not cognizable under *Gottshall* zone of danger test); *Crooks v. Metro-North Commuter Railroad Co.*, 1994 U.S. Dist. LEXIS 18473 (S.D.N.Y. Dec. 28, 1994) (plaintiff's being forced to work alone under unsafe conditions not cognizable under *Gottshall* zone of danger test); *Barlette v. Consolidated Rail Corporation*, 1994 U.S. Dist. LEXIS 18621 (W.D.N.Y. Dec. 8, 1994) (plaintiff's fear of an imminent physical altercation with his supervisor not cognizable under *Gottshall* zone of danger test); *McGinnis v. Norfolk & Western Ry. Co.*, 1994 U.S. Dist. LEXIS 18742 (E.D. Mich. Sept. 23, 1994) (plaintiff's fear of being fired not cognizable under *Gottshall* zone of danger test); *McMillan v. National Railroad Passenger Corporation*, 648 A.2d 428 (D.C. App. 1994) (plaintiff's being harassed by co-employees not cognizable under *Gottshall* zone of danger test); *Hawkes v. Norfolk & Western Ry. Co.*, 891 S.W.2d 568 (Mo. Ct. App. 1995) (plaintiff's being subjected to verbal abuse, harassment, and threats by co-employees or supervisors not cognizable under *Gottshall* zone of danger test).

In short, by allowing Vance's work-stress-related claim, the Supreme Court of Ohio completely and utterly disavowed this Court's decision in *Gottshall*. No doubt to avoid the clear holding and import of *Gottshall*, the Ohio Supreme Court, albeit reluctantly,[4] searched to find some

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[4] The Ohio Supreme Court's displeasure with this Court's prohibition on FELA workplace stress claims, evident throughout its opinion, is perhaps best illustrated by its suggestion that there might be some compensable hostile work environment claims that need not even include the threats of physical impact the court found in this case:

> Since plaintiff was in the zone of danger based on an immediate risk of physical impact, we need not

threat of "physical impact" among the numerous incidents of which Vance complained and came up with three that the court determined fit the bill (A.14). *See supra* n. 1. Of course, the totality of Vance's allegations demonstrates that his claim was for a stressful work environment with a few incidents of arguably physically threatening behavior sprinkled in. Moreover, as next discussed, the incidents involving a threat of physical impact, even if compensable in and of themselves, do not somehow transform Vance's non-compensable working conditions claim into a compensable claim.

B. Vance's Pleading Of Isolated Incidents Suggesting A Zone Of Danger Does Not Transform His Non-Compensable Work Stress Claim Into A Cognizable FELA Action.

The court in *Vance* was presented with two types of incidents that Vance alleged caused his emotional distress: (1) numerous incidents that involved teasing, cruel jokes, and general hostility towards him that created an unpleasant working environment, but that did not involve a threat of a physical impact; and (2) two incidents that involved a threat of a physical impact (a fellow

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> determine whether there would be some threshold level of hostility, accompanied by no threat of physical impact, that a plaintiff in a FELA action could demonstrate when the employer is allegedly negligent for allowing the atmosphere of abuse to flourish and that could allow the plaintiff's claim to proceed despite *Gottshall*. In that situation, the plaintiff's claim may be a square peg that does not appear to fit in *Gottshall's* round hole.

(A.15).

employee came at him with a chipping hammer and a fellow employee attempted to run him over). Assuming for the purpose of this petition that the second type of incident does meet the requirements of the *Gottshall* zone of danger test, the first type indisputably does not.

The correct disposition of *Vance* after *Gottshall* would be to disallow any claim or damages based on the non zone of danger incidents and to allow only the zone of danger incidents to go to the jury, which could award damages for emotional distress if it concluded that the plaintiff reasonably feared for his or her physical safety. But what the Supreme Court of Ohio did instead was to use the compensable zone of danger incidents as the hook to full recovery for the non-compensable, non zone of danger incidents. In this regard, the Ohio decision is utterly at odds with *Gottshall*.

The pernicious effect of the *Vance* decision is obvious: it invites plaintiffs simply to plead their way around *Gottshall*, thereby eviscerating this Court's decision. Under the *Vance* decision, a railroad worker could be subjected to hundreds of unpleasant, unfair, or abusive working incidents over a period of years, but as long as she or he could find and plead that one of those incidents involved a physical impact or the threat of a physical impact, she or he will recover all damages for all the otherwise uncompensable emotional distress arising from the unpleasant work environment. That result squarely conflicts with *Gottshall* and its proscription of all FELA negligent infliction of emotional distress claims except those based on a plaintiff being in the zone of danger of a physical impact.

Indeed, the policy concerns that informed the *Gottshall* decision are equally applicable here. Concerns about the genuineness of claims and infinite and unpredictable liability connected with claims for the negligent infliction of emotional distress do not disappear because a plaintiff can point to one or two instances that may have created a physical safety hazard in an overall stressful work environment. Virtually any routine workplace stress case could be transformed into a zone of danger case simply by pleading one incident where the plaintiff felt some threat of a physical impact resulting from his or her stressful environment.

This Court already has determined that permitting recovery under such a scenario stretches the FELA too far, and it must not allow the Supreme Court of Ohio's opinion below effectively to reverse that well-reasoned decision. While a plaintiff can recover after *Gottshall* for emotional distress arising from fear caused by a physical impact or the threat thereof, this Court has held that that is the beginning and the end of the FELA cause of action for the negligent infliction of emotional distress.

The fundamental conflict between this Court's decision in *Gottshall* and *Vance* perhaps is best revealed by applying the facts of *Carlisle* to the legal standard of *Vance*. Clearly, under the *Vance* decision, Carlisle could have pled his case as one involving a physical impact or threat of a physical impact by stressing the abuse inflicted on him by his supervisor, the railroad's instructions to ignore safety concerns, and the denial of police protection. Under the *Vance* framework, Carlisle could have argued that he was placed within the zone of danger by being subjected to an imminent risk of physical impact

as a result of these incidents. And under the *Vance* decision, if any one of these incidents was shown to have placed Carlisle in the zone of danger of physical impact, he could have recovered damages for the totality of his emotional distress arising from the very workplace stress that this Court expressly held is not cognizable under the FELA.

In sum, the *Vance* decision again opens the door to practically all workplace stress claims under the FELA – a door that this Court purposefully shut in *Gottshall*. The *Vance* decision simply reduces *Gottshall* to a mere pleading requirement. Given the "rough conduct and locker-room humor" of railroads (A.51), in virtually every railroad workplace stress case a plaintiff will experience some physical element, and will be able to emphasize those incidents in order to circumvent the *Gottshall* holding. This Court should grant this petition for certiorari in order to protect the integrity, validity, and continued viability of the *Gottshall* decision.

CONCLUSION

For the foregoing reasons, petitioner Consolidated Rail Corporation respectfully requests that this Court grant its petition for a writ of certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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Dated: November 13, 1995

No. _____

In The

Supreme Court of the United States

October Term, 1995

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

LARRY D. VANCE,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

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73 Ohio St.3d 222

VANCE, Appellant,

v.

CONSOLIDATED RAIL CORPORATION, Appellee.

No. 94-137.

Supreme Court of Ohio.

Submitted April 5, 1995.

Decided Aug. 16, 1995.

Former railroad employee sued railroad under Federal Employers' Liability Act (FELA), seeking damages for infliction of emotional distress. The Common Pleas Court overruled railroad's motion for directed verdict, the jury returned general verdict for former employee for $500,000 in damages, and the court denied the railroad's motions for judgment notwithstanding the verdict (JNOV) and for new trial. Railroad appealed. The Court of Appeals, Cuyahoga County, Porter, J., 1993 WL 462871, vacated jury verdict and entered judgment for railroad. The Supreme Court, Alice Robie Resnick, J., allowed motion to certify the record, and held that: (1) former employee was in zone of danger; (2) former employee raised jury question as to railroad's negligence; and (3) reasonable minds could have come to different conclusions regarding railroad's negligence.

Reversed and remanded.

Wright, J., filed concurring opinion.

Cook, J., filed dissenting opinion.

On January 26, 1990, plaintiff-appellant Larry D. Vance filed suit against his former employer, defendant-appellee Consolidated Rail Corporation ("Conrail"), seeking to recover damages from Conrail under the Federal Employers' Liability Act ("FELA"), Section 51 *et seq.*, Title 45, U.S.Code, for infliction of emotional distress he claimed to have suffered during his employment.

Plaintiff began his employment with Conrail in 1976, when the corporation was formed by the merger of seven separate bankrupt railroads into one unit. Plaintiff had been an employee of one of the railroads involved in the merger, the Erie Lackawanna Railroad ("Erie"), since 1968. He went on sick leave from Conrail in 1987, and remained on sick leave until 1988, when he was medically disqualified from work. In his complaint, plaintiff claimed he was incapacitated from working due to emotional distress brought about by an abusive work environment which Conrail negligently failed to correct. The basis of plaintiff's claim is set forth in paragraphs one and five of his complaint:

"1. This suit is brought under the Federal Employers' Liability Act (45 U.S.C., Sec. 51, *et seq.*). The action arises out of the failure of Defendant Railroad, Consolidated Rail Corporation, to provide Plaintiff, Larry Vance, with a safe place to work. Defendant Railroad negligently caused and inflicted upon Plaintiff severe emotional distress, anxiety, and depression. This caused disabling psychological harm, and accompanying physical harm.

" * * *

"5. The severe emotional distress and resulting injury were directly and proximately caused by Defendant Railroad. It negligently supervised and condoned the known conduct of Plaintiff's superiors and fellow employees who in the process of making work assignments and in other work related associations, subjected Plaintiff to torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule, and other severe emotional distress, because he was a former employee of Erie Lackawanna Railroad. This outrageous conduct throughout Plaintiff's employment relationship ultimately caused Plaintiff's said emotional breakdown and disqualification from his job, all of which was reasonably foreseeable by Defendant Railroad."

At trial, plaintiff testified that the former employees of Penn Central ("PC"), another railroad involved in the merger which formed Conrail, hated the less numerous former Erie employees. Plaintiff testified that he and other former Erie workers were subjected to name-calling, harassment and torment. Plaintiff recounted the following instances which he claimed were primarily inflicted by former PC employees. Specifically, he testified as to the following matters:

- He was called a scab and other scurrilous names by former PC employees of Conrail, and derogatory remarks about former Erie employees were written on locker room walls and elsewhere at the workplace.

- He found a dead bloody rat on top of his sandwich in his lunch box. Whoever put the rat into the lunch box had pried open the locked door of his truck cap [sic].

- Not being assigned a locker at some work locations forced him to change clothes in parking lots.

- Sugar was put in the gas tank of his wife's car while it was parked at a railyard when he drove it to work one day.

- His supervisors would override his decision to pull railcars out of service for defects and would put the cars back in service.

- He was not allowed to schedule his vacations when he wanted them, even though he had more seniority than those who got their chosen dates.

- He was nearly run over by another employee in a truck who wanted to "put a scare" into him.

- He was not furnished needed safety equipment and had to buy his own lantern and batteries when the company failed to provide them. He was not furnished a key to control the blue signal lights that indicated the presence of a worker on the tracks.

- In the presence of a supervisor, he was threatened by a fellow employee with a chipping hammer (a sharp-pointed hammer with a four-or five-inch handle used for removing scale from welds), which caused great emotional distress.

- He was taunted about his sex life after he confided in a fellow employee about impotency problems and the other workers learned of the problem.

- He was not properly oriented as to track layout by supervisors when he traveled to different railyards to work.

- The words "Erie scab" were scraped into the side of his own truck, apparently with a key.

- While working at a railyard, he received an anonymous phone call threatening that "you won't know what's going to hit you."

Plaintiff testified to a generally antagonistic work relationship between the former PC employees and the former Erie employees at Conrail and indicated that he believed Conrail did very little to regulate the conduct of former PC employees toward former Erie employees. Plaintiff testified that he complained of several of the abusive incidents recounted above to supervisors, and also that supervisors witnessed some of the incidents, but that no attempt to ameliorate the abuse was undertaken by Conrail. Plaintiff testified that it would have done no good for him to complain about the mistreatment through the union grievance process because the union was dominated by former PC employees who had no interest in stopping it.

Other witnesses, called both by plaintiff and by Conrail, also testified to animosity between the two groups of employees, although there was disagreement as to the extent of abuse. Conrail called some of the employees who allegedly had harassed plaintiff, and they denied that the events detailed by plaintiff had occurred. Conrail also called past supervisors of plaintiff, who testified that they did not remember that he had ever complained of harassment to them.

One of the chief points of contention between former Erie workers and Conrail was that many former Erie

employees lost seniority when the merger forming Conrail occurred. Plaintiff had participated in an unsuccessful lawsuit with other former Erie employees against Conrail and the union in an attempt to regain seniority. Conrail contended that any anxiety caused to plaintiff by the seniority dispute was irrelevant to plaintiff's FELA case, and had nothing to do with whether Conrail failed to provide plaintiff a reasonably safe workplace.

Plaintiff's treating psychiatrist, Dr. James Fry, testified that he began to treat plaintiff in 1985, at which time plaintiff told Dr. Fry of his difficulties and unhappiness with his employment since the merger forming Conrail. Dr. Fry diagnosed plaintiff as severely depressed. In 1987, Dr. Fry declared that plaintiff was medically disabled from work due to the depression, which Dr. Fry opined was caused by plaintiff's worrying about his job. Dr. Fry recommended electric shock therapy in 1988. Plaintiff received ten treatments. At the time of trial, plaintiff was receiving fairly large doses of a tranquilizer and an antidepressant. Dr. Fry testified that plaintiff did not speak of specific incidents of harassment on the job until 1988, after plaintiff was disabled from work. Dr. Fry further testified that plaintiff may not have related the incidents until that time due to embarrassment and shame. Dr. Fry also testified that, if the incidents of harassment did occur, they certainly would have contributed to plaintiff's depression.

After the trial court overruled Conrail's motion for a directed verdict, the jury returned a general verdict for plaintiff for $500,000 in damages. The trial court denied Conrail's motions for judgment notwithstanding the verdict and for a new trial.

Conrail appealed to the Court of Appeals for Cuyahoga County, raising seven assignments of error. The court of appeals, in a split decision which resolved only Conrail's first two assignments of error, vacated the jury verdict and entered judgment for Conrail, holding that Conrail's motions for a directed verdict and for judgment notwithstanding the verdict should have been granted. The court of appeals majority held that "plaintiff has not proven a cause of action for negligent infliction of emotional distress, even if one were available under the FELA." The majority determined that plaintiff had not proved that Conrail was negligent, in part because he did not show that he was subjected to "unconscionable abuse," and also because he "failed to show that Conrail should have reasonably foreseen his extreme reaction to railroad yard harassment." Based upon its finding of no negligence, the court of appeals majority found it unnecessary to decide whether a claim for negligent infliction of purely emotional distress is cognizable under the FELA.[1]

---

[1] In holding as it did, the court of appeals majority resolved only Assignments of Error I and II of Conrail's appeal, and found Assignments of Error III through VII moot, citing App.R. 12(A)(1)(c). Following are Conrail's seven assignments of error:

"I. The trial court erred in denying Conrail's motion for directed verdict/motion jnov on plaintiff's claim for negligent infliction of emotional distress.

"II. The trial court erred in denying Conrail's motion for directed verdict/motion jnov on the issue of negligence.

"III. The trial court erred in denying defendant's motion for directed verdict on the basis that plaintiff failed to plead a specific amount of monetary damages in his complaint.

The dissenting judge at the court of appeals concluded that a cause of action for emotional distress is available under the FELA, and believed that plaintiff presented sufficient evidence to create a jury question on the issue of Conrail's negligence. The dissenter would have overruled Conrail's first two assignments of error, and would have proceeded to address the remaining ones.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Wallace R. Steffen, Cleveland, for appellant.

Gallagher, Sharp, Fulton & Norman, and Sheila A. McKeon, Cleveland, for appellee.

ALICE ROBIE RESNICK, Justice.

The court of appeals' consideration of this case occurred before the United States Supreme Court announced its decision in *Consol. Rail Corp. v. Gottshall* (1994), 512 U.S. ___, 114 S.Ct. 2396, 129 L.Ed.2d 427, which resolved some issues pertinent to this appeal. In light of *Gottshall*, this case presents two issues for our review: (1) Does plaintiff's claim of negligent infliction of

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"IV. The trial court erred in denying defendant's motion for a directed verdict/motion jnov on the statute of limitations.

"V. The trial court erred in allowing the introduction of irrelevant and prejudicial testimony from plaintiff's fellow employees.

"VI. The trial court committed reversible error in failing to charge the jury that any award to plaintiff is not subject to income tax.

"VII. The trial court erred in permitting evidence of plaintiff's future lost wages."

emotional distress place him within the class of plaintiffs who may recover under the FELA? (2) If issue one is resolved in plaintiff's favor, did plaintiff sufficiently demonstrate that Conrail's negligence caused his injuries so as to create a jury question on Conrail's duty, breach of duty, foreseeability, and causation?

At this juncture, we clarify that, while plaintiff's claim may appear to be based upon the intentional actions of fellow employees, the essence of his FELA claim against Conrail is that his employer negligently failed in its duty to provide him with a safe workplace. Therefore, his claim sounds in terms of *negligent* infliction of emotional distress, going to Conrail's negligence in allowing a hostile workplace environment to flourish.

I

A

Federal Employers' Liability Act

Section 1 of the FELA, Section 51, Title 45, U.S.Code, provides that "[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

"In 1906, Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees. A primary purpose of the Act was to eliminate a number of traditional defenses to tort

liability and to facilitate recovery in meritorious cases. * * * The coverage of the statute is defined in broad language, which has been construed even more broadly." (Footnotes omitted.) *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 561-562, 107 S.Ct. 1410, 1413, 94 L.Ed.2d 563, 570-571. The FELA is to be liberally construed to further its remedial goal. *Gottshall*, 512 U.S. at ___, 114 S.Ct. at 2404, 129 L.Ed.2d at 440.

What constitutes negligence for purposes of the FELA is a federal question, which does not vary under different conceptions of negligence under non-FELA state and local laws. "Federal decisional law formulating and applying the concept governs." *Urie v. Thompson* (1949), 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282, 1295. Generally, "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Southwestern Ry. Co. v. Dickerson* (1985), 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303, 306. Thus, past decisions of the courts of this state setting the parameters of negligence law in Ohio are largely irrelevant to a negligence inquiry under the FELA. As a state court, we are as capable of interpreting the FELA as a federal court would be, but we apply the same federal law as the federal courts, without regard to Ohio's negligence law. Since we are bound to apply the unique body of federal decisional law interpreting the FELA, our discussion in this case is of virtually no precedential value to any non-FELA negligence issues that arise under Ohio law.

B

Gottshall and the "Zone of Danger" Test

In *Gottshall, supra,* the United States Supreme Court granted certiorari to determine "the threshold standard that must be met by plaintiffs bringing claims for negligent infliction of emotional distress under FELA." 512 U.S. at ___, 114 S.Ct. at 2403, 129 L.Ed.2d at 438. The *Gottshall* court determined that "claims for damages for negligent infliction of emotional distress are cognizable under FELA." *Id.* at ___, 114 S.Ct. at 2407, 129 L.Ed.2d at 444. The court went on to hold that "a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury." *Id.* at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 444.

The liability faced by a railroad for inflicting emotional distress is not, however, unlimited. Even though the FELA requires a liberal interpretation, it is not a workers' compensation statute. Liability is based on the employer's negligence. *Id.* at ___, 114 S.Ct. at 2404, 129 L.Ed.2d at 440. The *Gottshall* court, noting that common-law principles play a significant role in the development of the FELA negligence law, evaluated the various common-law tests which have developed to determine which claims of negligent infliction of emotional distress may go forward, based on the policy considerations underlying recognition of the tort. The court chose the "zone of danger" test as the proper test to be applied in determining whether, as a threshold matter, a plaintiff has stated a cognizable claim under the FELA. 512 U.S. at ___, 114 S.Ct. at 2410, 129 L.Ed.2d at 447.

Under the zone of danger test, recovery for emotional injury is limited "to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *Id.* at ___, 114 S.Ct. at 2406, 129 L.Ed.2d at 443. "Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Id.* at ___, 114 S.Ct. at 2410-2411, 129 L.Ed.2d at 448.

C

Was Plaintiff in the Zone of Danger?

Consistent with the principles espoused in *Gottshall,* we must determine if plaintiff's claim meets the requirements of the zone of danger test, which it must in order for him to be placed in the class of plaintiffs who may potentially recover under the FELA for the negligent infliction of emotional distress.

The United States Supreme Court opinion in *Gottshall* actually involved the appeals of two separate cases which were consolidated for review. The plaintiff in one of the cases, James Gottshall, sought to recover against his employer, Conrail, for negligent infliction of emotional distress. His claim was based on witnessing the death of a longtime friend and fellow employee. The cause of death was a heart attack which was allegedly precipitated by

Conrail's forcing employees, including the deceased friend and also plaintiff, to do overly strenuous work on a hot, humid day. See 512 U.S. at ___, 114 S.Ct. at 2400-2401, 129 L.Ed.2d at 435-436. Plaintiff Gottshall thus appeared to primarily present a theory of bystander recovery which involved to some extent witnessing an injury to another person as the event that brought about his distress. After holding that the zone of danger test must be satisfied for recovery for emotional distress under the FELA, the court declined to decide whether Gottshall was in the zone of danger, but remanded to the Third Circuit Court of Appeals to consider the issue. *Id.* at ___, 114 S.Ct. at 2411, 129 L.Ed.2d at 449. Since the *Gottshall* court made no comments on whether plaintiff Gottshall was in the zone of danger, we can discern no guiding principles emerging from the Supreme Court on that particular plaintiff's situation to aid us in our inquiry in the case before us.

The other case considered on appeal by the Supreme Court in *Gottshall* involved plaintiff Alan Carlisle. Carlisle claimed his employer, Conrail, caused him emotional distress, and a nervous breakdown, by subjecting him to a great deal of stress on his job, brought about by excessive work responsibilities and working overly long hours. See 512 U.S. at ___, 114 S.Ct. at 2402, 129 L.Ed.2d at 437-438. Plaintiff Carlisle thus based his claim against Conrail on emotional distress he suffered due to Conrail's alleged failure to provide a safe workplace. After enunciating the zone of danger test, the *Gottshall* court found as a matter of law that Carlisle was not in the zone of danger, refusing to "take the radical step of reading FELA as compensating for stress arising in the ordinary course

of employment." 512 U.S. at ___, 114 S.Ct. at 2412, 129 L.Ed.2d at 449.

In *Buell*, supra, the United States Supreme Court stated that "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." 480 U.S. at 568, 107 S.Ct. at 1417, 94 L.Ed.2d at 575. While *Gottshall* establishes the general rule that a plaintiff must be in the zone of danger to recover for emotional distress under the FELA, the case did not attempt to define which plaintiffs are in the zone of danger under situations factually distinguishable from those before the court. In such distinguishable situations, a case-by-case analysis must be undertaken.

We find, through the evidence he presented at trial, that plaintiff was placed in immediate risk of physical impact by Conrail's negligence, so that the zone of danger test was satisfied. In particular, plaintiff testified that important safety devices were denied to him, that a fellow employee came at him with a chipping hammer, and also that a fellow employee attempted to run him over. These instances of abuse to which plaintiff testified at trial indicating plaintiff's fear for his physical safety due to the acts of fellow employees are sufficient to place him in the zone of danger, pending a resolution by the jury of the relevant issues of fact. Plaintiff alleged that Conrail was negligent in failing to provide him with a safe place to work. While much of plaintiff's evidence went to Conrail's failure to provide an emotionally safe place to work, some of the evidence also went to Conrail's failure to provide a physically safe place to work, so that plaintiff

was in the zone of danger, as that requirement is defined in *Gottshall*.

We are struck by the differences between plaintiff's emotional-distress claim resulting from effects of his workplace environment and the emotional-distress claim of plaintiff Carlisle in *Gottshall*. Plaintiff here is claiming damages for injuries different in kind from those which arise in the ordinary course of employment. Plaintiff in this case claims that his injuries were caused by a *hostile* work environment, not merely by a *stressful* work environment.

Since plaintiff was in the zone of danger based on an immediate risk of physical impact, we need not determine whether there would be some threshold level of hostility, accompanied by no threat of physical impact, that a plaintiff in a FELA action could demonstrate when the employer is allegedly negligent for allowing the atmosphere of abuse to flourish and that could allow the plaintiff's claim to proceed despite *Gottshall*. In that situation, the plaintiff's claim may be a square peg that does not appear to fit in *Gottshall's* round hole.

II

That plaintiff was in the zone of danger, and so satisfies the threshold *Gottshall* test placing him within the class of plaintiffs who may recover for negligent infliction of emotional distress under the FELA, answers only one of the issues in this case. "To prevail on a FELA claim, a plaintiff must 'prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.' " *Adams v. CSX Transp., Inc.* (C.A.6, 1990), 899

F.2d 536, 539, quoting *Robert v. Consol. Rail Corp.* (C.A.1, 1987), 832 F.2d 3, 6. The court of appeals majority in this case found that plaintiff failed to prove that Conrail was negligent. We, therefore, must examine the elements of plaintiff's claim.

As this case comes to us, the court of appeals majority reversed the trial court's denial of Conrail's motions for a directed verdict and for judgment notwithstanding the verdict. In FELA cases Ohio law applies where matters of procedure, rather than of substantive federal FELA law, are involved, so that both motions must be evaluated under Ohio's Civ.R. 50. In so doing the evidence must be construed most strongly in favor of the party opposing the motion. To grant either motion, a trial court must find that reasonable minds could come to but one conclusion and that conclusion must be adverse to the party opposing the motion. Civ.R. 50(A)(4); *White v. Ohio Dept. of Transp.* (1990), 56 Ohio St.3d 39, 45, 564 N.E.2d 462, 468 (if reasonable minds can come to more than one conclusion the issue should go to the jury). See *McNees v. Cincinnati Street Ry. Co.* (1949), 152 Ohio St. 269, 272-273, 40 O.O. 318, 320, 89 N.E.2d 138, 141 (standards for granting motion for judgment notwithstanding the verdict and for granting motion for directed verdict are the same).

As a preliminary matter, we agree with the observation made by the court of appeals majority that "there was sufficient medical evidence to establish that plaintiff was suffering from chronic and disabling depression." Conrail does not dispute that plaintiff has suffered emotional injury. Conrail does dispute, however, that the injury is attributable to its negligence.

A

Duty

There is no doubt that an employer has a responsibility under the FELA to provide a safe place to work. Furthermore, "as part of its 'duty to use reasonable care in furnishing its employees with a safe place to work,' *Buell*, 480 U.S. [557], at 558 [94 L.Ed.2d 563 at 568, 107 S.Ct. 1410 at 1412], a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury." *Gottshall*, 512 U.S. at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 444. The zone of danger test outlines Conrail's duty pertaining to negligent infliction of emotional distress. *Id.* at ___, 114 S.Ct. at 2410, 129 L.Ed.2d at 447. Conrail clearly had a duty to provide plaintiff, an employee in the zone of danger, with a reasonably safe workplace.

B

Breach of Duty

Plaintiff testified that the atmosphere of abuse endured by former Erie employees was pervasive throughout the company. It does not require a great leap of reasoning to conclude that if the jury gave credence to plaintiff's allegations, then Conrail had to be aware of the abusive environment, or at the very least, should have been aware of it. Plaintiff alleged that foremen witnessed some of the incidents of abuse, and that nothing was ever done by Conrail to deal with the problems in plaintiff's work environment. Conrail countered at trial by presenting evidence that plaintiff never sufficiently complained of the abuse, and also that much of the abuse did not

actually occur, or if it did occur that plaintiff exaggerated the significance of the events. If the jury accepted plaintiff's view of the facts, it could easily have determined that Conrail, acting through its "officers, agents, or employees" (Section 51, Title 45, U.S.Code) at the very least should have been aware that plaintiff was in an unsafe work environment. We find that plaintiff presented sufficient evidence to create a jury question on whether Conrail breached its duty to provide a safe workplace.

In *Adams, supra,* 899 F.2d at 539-540, the United States Court of Appeals for the Sixth Circuit held that the FELA requires a plaintiff claiming emotional injury to show "unconscionable abuse" before an employer can be found to have breached its duty to provide a safe workplace.

The court of appeals in this case reversed the jury verdict in part because it determined that plaintiff failed to show unconscionable abuse. However, the trial judge instructed the jury that plaintiff had to show that "Conrail's actions amounted to unconscionable abuse" before it would be established that a breach of the duty to provide a safe workplace occurred. Since the jury returned a general verdict for plaintiff that was unclarified by interrogatories, we must assume that the jury followed the trial court's instruction in this regard and that the jury found that plaintiff did suffer unconscionable abuse, as required by *Adams.* We do not comment on the ambiguities of requiring unconscionable abuse (a concept that seems more appropriate in an inquiry regarding a claim for *intentional* infliction of emotional distress) in a *negligence* action brought under the FELA. Furthermore, we need not determine whether the

Adams unconscionable-abuse test is consistent with the general contours of the Supreme Court's opinion in *Gottshall*, because we find that plaintiff met the heightened burden of showing unconscionable abuse.

C

Foreseeability

The court of appeals majority in this case reversed the jury verdict for plaintiff in part because it found that plaintiff failed to show Conrail should have foreseen his "extreme reaction" to the claimed workplace abuse. However, the foreseeability of plaintiff's reaction is directly dependent on the degree of abuse he endured. As discussed above, we must assume that the jury found that Conrail at the least should have been aware of the hostile work environment surrounding plaintiff; we must also assume that the mistreatment plaintiff endured amounted to unconscionable abuse. We cannot say that a plaintiff who endures unconscionable abuse is not to be expected to display strong reactions or emotions. We are not prepared, as the court of appeals majority was, to characterize plaintiff's response to his situation as an "extreme reaction," which Conrail could not have foreseen as a matter of law. Instead, we find that plaintiff created a jury question as to foreseeability. Since the jury's general verdict was unclarified by interrogatories, we accept the jury's decision that plaintiff's reaction was not excessive given the circumstances, a decision the jury necessarily had to make to arrive at its ultimate conclusion that Conrail was negligent.

D

Causation

As part of the liberal construction accorded to the FELA, a "relaxed standard of causation applies" to a negligence claim under the act. *Gottshall*, 512 U.S. at ___, 114 S.Ct. at 2404, 129 L.Ed.2d at 440. "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific RR. Co.* (1957), 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, 499. We see no reason to apply a more stringent standard of causation for emotional injury under the FELA than for physical injury, recognizing like the Supreme Court in *Gottshall* that " 'severe emotional injuries can be just as debilitating as physical injuries,' " 512 U.S. at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 444 (quoting *Gottshall v. Consol. Rail Corp.* [1993], 988 F.2d 355, 361). We therefore find that in the process of establishing the other elements of Conrail's negligence to the satisfaction of the jury, plaintiff easily met his burden of proving that Conrail's negligence played at least a slight part in producing his injury.

III

In summary, based on Part I of our discussion, plaintiff was in the zone of danger under the standards set forth by the Supreme Court in *Gottshall* for recovery for emotional injury under the FELA. In addition, based on Part II of our discussion, we agree with the conclusion of the dissenting judge below that plaintiff raised a jury

question as to Conrail's negligence. Construing the evidence most strongly in favor of plaintiff, we defer to the decision of the jury, since reasonable minds could come to different conclusions regarding Conrail's negligence. We adopt the position of the dissenting judge below, who would have resolved Conrail's first two assignments of error in that court by concluding that Conrail's "motions for directed verdict and judgment notwithstanding the verdict were correctly overruled by the trial court."

For all the foregoing reasons, the judgment of the court of appeals on the issues addressed in its opinion is reversed.[2] We remand this cause to the court of appeals for further proceedings, to allow that court to rule on those assignments of error raised by Conrail that have not yet been addressed.

Judgment reversed and cause remanded.

MOYER, C.J., and DOUGLAS, FRANCIS E. SWEENEY, Sr. and PFEIFER, JJ., concur.

WRIGHT, J., concurs separately.

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[2] In addition to arguments relative to the FELA, plaintiff argues that the court of appeals actually reversed the jury verdict by a two-to-one vote on the weight of the evidence, thereby violating the prohibition contained in Section 3(B)(3), Article IV of the Ohio Constitution that "[n]o judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." We find that the court of appeals majority did not reverse on the weight of the evidence, but reversed based on its resolution of a question of law, so that a violation of the Ohio Constitution did not occur. *See Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 23 O.O.3d 115, 430 N.E.2d 935.

COOK, J., dissents.

WRIGHT, Justice, concurring.

I write separately because I believe that the majority applies an imperfect analysis to the case at hand. In so doing, the majority opinion distorts the otherwise clear distinction between intentionally and negligently inflicted emotional distress and, as a result, also distorts the scope of an employer's liability under the FELA for intentional injuries inflicted upon an employee by another employee.

The majority construes Vance's FELA claim against Conrail as a claim for negligent infliction of emotional distress. Although Vance obviously suffers from emotional distress, that distress was not *negligently* inflicted. More accurately, Vance's fellow employees *intentionally* caused his emotional distress. Properly construed, Vance's claim against Conrail is not that Conrail negligently inflicted emotional distress on him, but rather that Conrail negligently supervised its employees, thereby allowing the intentional acts of abuse to occur. In fact, this is the theory advanced in Vance's complaint:

"5. The severe emotional distress and resulting injury were directly and proximately caused by Defendant Railroad. It *negligently supervised* and condoned the known conduct of Plaintiff's superiors and fellow employees who * * * subjected the Plaintiff to torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule, and other severe emotional distress, because he was a former employee of Erie Lackawanna Railroad." (Emphasis added.)

The majority follows the United States Supreme Court's analysis in *Consol. Rail Corp. v. Gottshall* (1994), 512 U.S. ___, 114 S.Ct. 2396, 129 L.Ed.2d 427, to reach the conclusion that Conrail is liable for negligent infliction of emotional distress. In *Gottshall,* Gottshall's supervisor made Gottshall's crew work without appropriate breaks in hot and humid conditions. Gottshall suffered emotional distress after the harsh conditions caused the death of his friend and the supervisor ordered the crew to continue to work within sight of the body. The case did not involve allegations that the supervisor acted with the intent of causing Gottshall, or any other employee, emotional distress. Instead, it seems that the supervisor ordered the crew to work without scheduled breaks and to continue to work after the death of Gottshall's friend for the simple reason that the track had to be repaired as quickly as possible. *Id.* at ___, 114 S.Ct. at 2400-2401, 129 L.Ed.2d at 435-436.

The issue that the *Gottshall* court faced was whether a claim for negligent infliction of emotional distress is cognizable under the FELA. *Id.* at ___, 114 S.Ct. at 2403, 129 L.Ed.2d at 439. The court addressed this issue by considering whether a negligently inflicted emotional injury may constitute a compensable "injury" under the FELA. *Id.* at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 444. After noting that " 'severe emotional injuries can be just as debilitating as physical injuries,' " the court found that a negligently inflicted emotional injury is a compensable injury under the FELA. *Id.*, quoting *Gottshall v. Consol. Rail Corp.* (C.A.3, 1993), 988 F.2d 355, 361. Of the three common-law tests for validly asserted claims of negligent infliction of emotional distress, the court adopted the

"zone of danger" test, finding that it best reconciled the competing concerns of providing a realistic limit to liability and the remedial nature of the FELA. *Id.* at ___, 114 S.Ct. at 2410, 129 L.Ed.2d at 447.

The case at hand, which involves an intentionally inflicted injury, is clearly distinguishable from *Gottshall.* The question presented in *Gottshall* was whether a negligently inflicted emotional injury is compensable under the FELA. The court specifically refused to answer the question of whether an intentionally inflicted emotional injury is compensable. *Id.* at ___, 114 S.Ct. at 2403, 129 L.Ed.2d at 439, fn. 2.

In this case, the employees' conduct that caused Vance's emotional distress may only be characterized as intentional; through their acts they *intended* to harass Vance and cause him severe emotional distress. The intent to harass Vance is obvious from the behavior at issue, which included attacking Vance with a chipping hammer, attempting to run him over with a truck, taunting him about his sexual dysfunction, placing sugar in his wife's gas tank, scratching "Erie scab" on the side of his truck, and placing a dead, bloody rat in his lunch box. This type of conduct does not qualify as negligent infliction of emotional distress because the employees did not "unintentionally cause [ ] emotional distress to another." 2 Restatement of the Law 2d, Torts (1965), Section 313. Instead, this conduct is properly characterized as intentional infliction of emotional distress: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress * * * ." *Yeager v. Local Union* 20 (1983), 6 Ohio St.3d 369, 6 OBR 421, 453

N.E.2d 666, syllabus; 1 Restatement of the Law 2d, Torts (1965), Section 46.

Because Vance's injury is the result of intentional acts by coworkers acting outside the scope of their employment, Conrail cannot be liable for his emotional injury under the theory of *respondeat superior.* See Annotation (1966), 8 A.L.R.3d 442. Although Conrail cannot be vicariously liable for Vance's injury, it may still be liable to the extent it was negligent in allowing its employees to intentionally harass Vance. This theory, which has a long history under the FELA, provides that an employer may be liable for injuries received by an employee as a result of an intentional tort of a coemployee if the employer was negligent in hiring, supervising, or failing to fire the employee who caused the injury. See *Harrison v. Missouri Pacific RR. Co.* (1963), 372 U.S. 248, 83 S.Ct. 690, 9 L.Ed.2d 711; *Taylor v. Burlington N. RR. Co.* (C.A.9 1986), 787 F.2d 1309; *Lancaster v. Norfolk & W. Ry. Co.* (C.A.7 1985), 773 F.2d 807, 818, certiorari denied (1987), 480 U.S. 945, 107 S.Ct. 1602, 94 L.Ed.2d 788; *Green v. River Terminal Ry. Co.* (C.A.6 1985), 763 F.2d 805; Annotation (1966), 8 A.L.R.3d 442, 446. See, also, 2 Restatement of the Law 2d, Agency (1965), Section 219; 2 Restatement of the Law 2d, Torts (1965), Section 317.

Before determining whether Conrail breached a duty it owed to Vance by failing to adequately supervise the employees who harassed him, it must first be determined whether an intentionally inflicted emotional injury is a compensable injury under the FELA. *Gottshall, supra,* 512 U.S. at ___, 114 S.Ct. at 2410-2411, 129 L.Ed.2d at 447-448.

Significantly, the United States Court of Appeals for the Sixth Circuit has held that an intentionally inflicted, purely emotional injury is not compensable under the FELA. *Adkins v. Seaboard Sys. RR.* (1987), 821 F.2d 340. Specifically, the *Adkins* court held that a claim by an employee that he suffered emotional distress as a result of being threatened with discharge was not compensable. The court based its decision on three grounds. First, the court reasoned that the FELA has not been held to provide compensation for purely emotional injuries. *Id.* at 342. Second, the court reasoned that the FELA "has not been applied to any intentional torts lacking any physical dimension." *Id.* at 341. Third, the court reasoned that the FELA provides a remedy for negligently inflicted injuries and the plaintiff had not alleged that the railroad was negligent. *Id.*

The broad pronouncement by the court in *Adkins* that an emotional injury caused by intentionally inflicted emotional distress is not cognizable under the FELA has become suspect in light of the United States Supreme Court's decision in *Gottshall, supra.* Specifically, the *Gottshall* court expressly decided that purely emotional injuries are compensable under the FELA. And although the *Gottshall* court required some physical dimension to the injury, manifested in the "zone of danger" test, actual physical contact is now not a requirement for a claim to be cognizable under the FELA. Of course, the Sixth Circuit's decision remains correct as to the facts of *Adkins,* because the court in *Gottshall* declined to "take the radical step of reading FELA as compensating for stress arising in the ordinary course of employment." *Gottshall, supra,* 512 U.S. at ___, 114 S.Ct. at 2412, 129 L.Ed.2d at 449.

Even though the *Gottshall* court decided that an emotional injury caused by negligent infliction of emotional distress is a compensable injury under the FELA, it did not decide whether an intentionally inflicted emotional injury may also be compensable. In order to decide this question, it is necessary to consider the nature of the cause of action in light of the history and policies of the FELA to ensure their compatibility. In reviewing the history of the tort of intentional infliction of emotional distress, it becomes evident that, like negligent infliction of emotional distress, this tort existed at the time the FELA was adopted in 1908. See Magruder, Mental and Emotional Disturbance in the Law of Torts (1936), 49 Harv.L.Rev. 1033, 1052; Prosser & Keeton, Law of Torts (5 Ed.1984) 60. As the tort has developed, several elements have surfaced as being necessary to a valid claim. First, the conduct which brings about the distress must be extreme and outrageous. Magruder, *supra*, at 1053; 1 Restatement of the Law 2d, Torts (1965), Section 46, Comment *d* ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). Second, the plaintiff must have suffered severe emotional distress. Prosser, *supra*, at 63; 1 Restatement of the Law 2d, Torts (1965), Section 46, Comment *j* ("Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.").

The court in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell* (1987), 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563, noted that the common law of intentional infliction of emotional distress, like the common law of negligent infliction of emotional distress, is not uniform, and that jurisdictions have adopted different forms of the tort in three significant respects. *Id.* at 568-569, 107 S.Ct. at 1417, 94 L.Ed.2d at 575. Specifically, the court noted that some jurisdictions allow recovery for recklessly inflicted, as well as intentionally inflicted, emotional injuries, that some jurisdictions require physical manifestation of the emotional injury, and that some jurisdictions consider the relationship of the parties and place special emphasis on the workplace. *Id.* In noting these differences, the court in *Buell* seemed concerned with whether the more relaxed versions of this tort were consistent with the FELA's underlying policies. This was the concern raised by the court in *Gottshall* when it reviewed the tort of negligent infliction of emotional distress. Specifically, that court noted that the FELA is not a "workers' compensation statute," that railroads are not "the insurers of the emotional well-being and mental health of their employees," and that the FELA does not provide a remedy for "stress arising in the ordinary course of employment." *Gottshall, supra,* 512 U.S. at ___, ___, ___, 114 S.Ct. at 2404, 2409, 2412, 129 L.Ed.2d at 440, 446, 449. In other words, in order for an intentionally inflicted injury to be a compensable injury under the FELA, the scope of the compensable injury must be subject to reasonable limits.

I believe that the traditional elements of the common-law tort of intentional infliction of emotional distress go a

long way towards satisfying the court's concern of placing reasonable limits on the types of emotional injuries that are compensable. First, because this case involves intentionally inflicted emotional injuries, it is not necessary to determine whether recklessly inflicted emotional injuries are compensable under the FELA. Second, the requirement that the emotional injury be severe significantly limits the potential class of plaintiffs. Third, the fact that the abusive behavior must qualify as "extreme or outrageous" or "unconscionable abuse" also limits the class of plaintiffs to those who have been subjected to only the most outrageous behavior. See *Buell, supra,* 480 U.S. at 567, 107 S.Ct. at 1416, 94 L.Ed.2d at 574, fn. 13. Additionally, the context within which the abusive behavior occurs has an impact on whether particular behavior is sufficiently outrageous. Prosser, *supra,* supplement at 18. "The salon of Madame Pompadour is not to be likened to the rough-and-tumble atmosphere of the American oil refinery." *Eddy v. Brown* (Okla.1986), 715 P.2d 74, 77. Given that a railroad yard can present a similar rough-and-tumble atmosphere, acts of harassment in that context must be particularly egregious to qualify as unconscionable abuse. Fourth, even though actual physical manifestation of the distress is not required, *Gottshall, supra; Taylor, supra,* 787 F.2d 1309; *Yeager, supra,* 6 Ohio St.3d at 374, 6 OBR at 425, 453 N.E.2d at 671; Magruder, *supra,* 49 Harv.L.Rev. at 1058, where physical manifestation of an emotional injury is not present, courts require a greater showing that the conduct is extreme and outrageous. Prosser, *supra,* at 64.

However, in order to ensure that only those intentionally inflicted emotional injuries that are consistent

with the FELA will be compensated, I believe it is necessary to supplement the common-law elements of the tort of intentional infliction of emotional distress. Specifically, given the FELA's focus on physical perils, see *Lancaster, supra,* 773 F.2d at 813, and the *Gottshall* court's determination that the FELA does not provide compensation for "stress arising in the ordinary course of employment," *Gottshall, supra,* 512 U.S. at ___, 114 S.Ct. at 2412, 129 L.Ed.2d at 449, I believe a plaintiff seeking recovery under the FELA for an emotional injury caused as a result of intentional infliction of emotional distress must show that the injury was caused, at least in part, by physically menacing behavior. See *Gottshall, supra,* 512 U.S. at ___, 114 S.Ct. at 2412, 129 L.Ed.2d at 449. Given the addition of the above element, I believe it is clear that an intentionally inflicted, severe emotional injury which was caused, at least in part, by physically menacing behavior constituting unconscionable abuse qualifies as a compensable injury under the FELA.

The next question is the scope of an employer's duty to prevent its employees from intentionally inflicting emotional distress upon other employees. The court in *Buell* noted that under the FELA an employer has a duty to use reasonable care in furnishing its employees with a safe place to work. *Buell, supra,* 480 U.S. at 558, 107 S.Ct. at 1412, 94 L.Ed.2d at 568. That duty includes the obligation to take reasonable precautions to prevent severe emotional abuse of one employee by other employees. *Halko v. New Jersey Transit Rail Operations, Inc.* (S.D.N.Y.1987), 677 F.Supp. 135. " '[A] railroad is guilty of negligence if it fails to prevent reasonably foreseeable

danger to an employee from intentional or criminal misconduct.' " *Green, supra,* 763 F.2d at 808, quoting *Brooks v. Washington Terminal Co.* (C.A.D.C.1979), 593 F.2d 1285, 1288, certiorari denied (1979), 442 U.S. 910, 99 S.Ct. 2823, 61 L.Ed.2d 275. Reasonable foreseeability of the harm is an "essential ingredient" of an employer's liability under the FELA. *Gallick v. Baltimore & Ohio RR. Co.* (1963), 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618. "[T]he fact that 'the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it.' " *Harrison, supra,* 372 U.S. at 249, 83 S.Ct. at 690-691, 9 L.Ed.2d at 713, quoting *Lillie v. Thompson* (1947), 332 U.S. 459, 462, 68 S.Ct. 140, 142, 92 L.Ed. 73, 75. In that vein, a railroad will not be liable for the intentional harassment of one employee by another employee unless it knew or had reason to know of the offending employees' vicious propensities or that the work area is conducive to an unreasonable risk of unconscionable abuse. *See Green, supra,* 763 F.2d at 808-809; *Persley v. Natl. RR. Passenger Corp.* (D.Md.1993), 831 F.Supp. 464, 468-469. With respect to the types of intentionally inflicted injuries that are foreseeable, it seems clear that an employer may be liable for only those injuries which the employer could have potentially prevented. In other words, where an employee acts outside the scope of his employment, an employer can be liable only if the offending conduct occurs on the employer's premises and the employer knew or had reason to know that it could control the employee's conduct and knew or had reason to know of the necessity and opportunity to exercise that control, and failed to do so.

See 2 Restatement of Law 2d, Torts (1965) 125, Section 317.

Vance presented sufficient evidence from which a jury could find that Conrail's employees intentionally caused him severe emotional distress through physically menacing behavior. The jury was properly instructed that a finding of "unconscionable abuse," as set forth in *Buell, supra*, 480 U.S. at 567, 107 S.Ct. at 1416, 94 L.Ed.2d at 574, fn. 13, was a prerequisite to Vance's being able to recover. The types of harassment to which he was subjected were sufficient for a jury to find that they constituted "unconscionable abuse," and it is obvious that a significant portion of the harassment, specifically the attack with the chipping hammer and the attempted hit and run with the truck, was physically menacing in nature. Vance also presented sufficient evidence from which the jury could find that his emotional injury was of such severity as to justify recovery even though there were no physical manifestations of his injury. As a result, Vance met the burden of proof required to show that his emotional injury is a compensable injury under the FELA.

Vance also met his burden of proving that Conrail failed in its duty to provide him with a safe workplace. The jury was instructed that Conrail had a duty to use ordinary care to protect its employees from foreseeable danger. The jury was also instructed that in order for Vance to recover, the jury had to find that Conrail was negligent in allowing the emotional abuse to occur. The court instructed the jury that, in order to find Conrail liable, they had to find that Vance's injuries were reasonably foreseeable. Vance presented sufficient evidence from which the jury could find that Conrail knew of the

generally abusive environment in the railyard between the former employees and the particular abuse he was receiving to support a determination that Conrail knew or should have known that the work area was conducive to an unreasonable risk of unconscionable abuse. Additionally, Vance presented sufficient evidence to support a finding that Conrail's failure to properly supervise its employees was a cause of his injuries. As a result, Vance presented sufficient evidence to support a finding that Conrail was liable for his emotional injury because it failed to adequately supervise the offending employees.

Thus, I agree with the majority's reversal of this matter but reject in part its reasoning.

COOK, Justice, dissenting.

I respectfully dissent. In my view, Vance did not prove he should recover for his emotional injury under FELA as such claims have been delimited by the United States Supreme Court in *Consol. Rail Corp. v. Gottshall* (1994), 512 U.S. ___, 114 S.Ct. 2396, 129 L.Ed.2d 427. Recovery for negligently inflicted, purely emotional injuries, according to *Gottshall*, is limited to "zone of danger" situations. Vance's claim, premised on a hostile work environment produced by sporadic, intentional incidents of harassment by various co-workers, is not cognizable for negligent infliction of emotional distress.

I

Because recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability

for defendants, courts have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable. *Id.* at ___, 114 S.Ct. at 2405, 129 L.Ed.2d at 442. The court held in *Gottshall* that negligent infliction of emotion distress is cognizable under FELA, meaning that, as a part of its " 'duty to use reasonable care in furnishing its employees with a safe place to work,' * * * a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury." (Citation omitted.) *Id.* at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 444. The court cautioned that the duty, however, is not self-defining. *Id.* "[T]he common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid inflicting emotional injury." *Id.* at ___, 114 S.Ct. at 2408, 129 L.Ed.2d at 445.

Referring then to the common law of the states on the subject, the court noted that "[n]o jurisdiction, however, allows recovery for *all* emotional harms, no matter how intangible or trivial, that might be causally linked to the negligence of another. Indeed, significant limitations, taking the form of 'tests' or 'rules,' are placed by the common law on the right to recover for negligently inflicted emotional distress, and have been since the right was first recognized late in the last century." *Id.* at ___, 114 S.Ct. at 2405, 129 L.Ed.2d at 441.

Having considered the various "tests" and "rules" used in the common law to define the class of plaintiffs who may recover for negligent infliction of emotion distress, the court adopted the "zone of danger" limiting test, which holds that " 'those within the zone of danger

of physical impact can recover for fright, and those outside of it cannot.' " *Id.* at ___, 114 S.Ct. at 2406, 129 L.Ed.2d at 443, quoting Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules (1982), 34 U.Fla.L.Rev. 477, 489. "The zone of danger test also is consistent with FELA's central focus on physical perils." *Id.* at ___, 114 S.Ct. at 2410, 129 L.Ed.2d at 447. The court wrote that the "zone of danger" test is "based on the realization that 'a near miss may be as frightening as a direct hit.' " *Id.* at ___, 114 S.Ct. at 2406, 129 L.Ed.2d at 443, quoting Pearson at 488. The "zone of danger" test "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct," in situations involving a frightening, accidental near miss. *Id.* Thus, the court concluded that the "zone of danger" test is "a well-established 'common-law concep[t] of negligence,' that is suitable to inform our determination of the federal question of what constitutes negligence for purposes of FELA."[3] (Citations omitted.) *Id.* at ___, 114 S.Ct. at 2410, 129 L.Ed.2d at 447.

With this as the relevant legal framework, the facts and allegations proven by Vance did not support a case for negligent infliction of emotional distress. As perceived by the majority, Vance demonstrated that he was

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[3] In *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 1411, 651 N.E.2d 1309, decided today, we held that in order to recover for negligent infliction of emotional distress in Ohio, a plaintiff has to have suffered the emotional injury from witnessing or experiencing a dangerous accident or have had an appreciation of actual physical peril.

subjected to a "hostile workplace environment" at work. This is not within the narrow limits of a "zone of danger" test, i.e., fright caused by imminent physical peril. The incidents such as the rat in the lunch box, the scratched car, the taunting about sexual matters, the sugar in the gas tank, or the failure to provide safety equipment were bundled by the majority as if each meets the "zone of danger" test.

The two incidents involving threats of physical peril, the chipping hammer incident and the co-worker trying to run down Vance with a vehicle in the yard, are intentional acts and thus do not fit the *Gottshall* constraints. The railroad had a duty to avoid subjecting Vance to *negligently* inflicted emotional injury as defined by the "zone of danger" test. Vance, of course, did not allege nor did he wish to try to prove that the employer intentionally inflicted emotional distress.

Both the majority and concurring opinions consider the applicability of a theory of negligent supervision to this case. In my view, that theory fails for two reasons. First, such claims may be brought under FELA for intentional acts of a co-employee only where there is a physical injury, not a purely emotional injury. Limitation of the purely emotional claims to "zone of danger" scenarios is the upshot of the *Gottshall* decision. Second, even if one could recover for purely emotional injuries under a negligent supervision theory, Vance did not present evidence that either the chipping hammer incident or the attempted rundown was committed by an employee who had previously demonstrated such behavior, thereby triggering the employer's duty to discipline or discharge such employee. To the contrary, the majority opinion

casts a duty on railroads to regulate conduct of the general employee population rather than limiting the duty to an offending individual employee. Of critical importance, in most of the incidents, no culprit was even identified. Rather, it is only by evidence of a "pervasive" attitude in the company that the majority holds the employer to the nebulous duty "to deal with the problems" in Vance's work environment.

II

I also differ with the majority's employing the "unconscionable abuse" test from *Adams v. CSX Transp., Inc.* (C.A.6, 1990), 899 F.2d 536, decided before *Gottshall.* Because *Gottshall* limits claims of negligent infliction of emotional distress to the class of plaintiffs meeting the "zone of danger" test, the *Adams* "unconscionable abuse" test is no longer applicable.

Conclusion

The majority decision merits the same criticism the Supreme Court leveled at the Third Circuit's decision it reviewed in *Gottshall,* i.e., that the "ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees." 512 U.S. at ___, 114 S.Ct. at 2409, 129 L.Ed.2d at 446. Because the majority violates the boundary imposed by *Gottshall* on FELA claims for purely emotional injury, I dissent and would affirm the judgment of the court of appeals.

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Larry D. VANCE, Plaintiff-Appellee,

v.

CONSOLIDATED RAIL CORPORATION, Defendant-Appellant.

No. 63806.

Court of Appeals of Ohio, Cuyahoga County.

Nov. 10, 1993.

Civil appeal from Common Pleas Court Case No. 183406. Reversed and vacated; judgment for appellant.

Wallace R. Steffen, Cleveland, for plaintiff-appellee.

Sheila A. McKeon, Gallagher, Sharp, Fulton & Norman, Cleveland, for defendant-appellant.

OPINION

PORTER, Judge:

Defendant-appellant Consolidated Rail Corporation ("Conrail") appeals from a jury verdict of $500,000 in favor of plaintiff-appellee, Larry D. Vance, in a FELA case in which plaintiff claimed emotional distress and depression resulting from an alleged hostile work environment tolerated by Conrail. Defendant Conrail claims that the trial court erred in failing to direct a verdict or grant j.n.o.v. on the merits, on statute of limitation grounds, on failure to plead specific monetary damages and further erred in the admission of evidence, in instructing the jury and permitting evidence of lost wages. We find merit to

Conrail's appeal and reverse and enter judgment for said defendant for the reasons hereinafter stated.

This claim was brought by a former employee of Conrail on January 26, 1990 under the Federal Employers' Liability Act ("FELA") 45 U.S.C. § 51 et seq. Plaintiff claims the defendant negligently failed to provide him an emotionally safe place to work in that plaintiff, a former employee of The Erie Lackawanna Railroad, suffered harassment and emotional distress at the hands of his co-workers, former employees of the Penn Central.

Plaintiff Vance was a carman with The Erie Lackawanna Railroad (Erie) from 1968 to 1976. In 1976 the Erie and six other bankrupt railroads (including the Penn Central) were merged to form Consolidated Rail Corporation (Conrail). Plaintiff became a Conrail employee and lost eight years of seniority through the reconciliation of employees' rights resulting from the merger of the seven railroads.

Plaintiff testified that from the day of merger the more numerous Penn Central employees hated the former employees of the Erie whom they constantly harassed and tormented. As a part of this harassment: he and other Erie employees were called scabs and other scurrilous names; a bloody rat was put in his lunch box; he was not always given a locker at new work locations; he received intimidating phone calls; sugar was put in the gas tank of his wife's car; his supervisors would override the bad order tickets he put on defective rail cars; he could not take vacations when he wanted them; he was almost run over by a fellow employee at night; he had to buy his own lantern and was not furnished appropriate

safety equipment; a fellow employee threatened him with a chipping hammer; his fellow employees made taunting and suggestive remarks about his wife and his sex life; and graffiti on the walls of locker rooms, bathrooms and box cars degraded former Erie employees. Testimony supported an overall atmosphere of animosity directed at former Erie employees by former Penn Central employees. The management of Conrail took no action to alleviate this hostility.

Vance claimed that as the result of this harassment he sought psychiatric help in 1985; took medical leave in May 1987 and in August 1988 was medically disqualified from work. Medical testimony at trial supported his claim of chronic and disabling depression which the stress of his work life caused or to which it contributed.

Aside from plaintiff's testimony, there was no evidence that Conrail management was informed of his harassment. His supervisors testified that they had no complaints of harassment from plaintiff. His shop files from his work locations contained no record of such complaints. Over the objections of defendant, five witnesses (former Erie employees) testified to their personal work experiences at Conrail. None of these witnesses testified to personal harassment of the plaintiff although they all testified to hostility between former Erie employees and former Penn Central employees.

Between 1981 and 1984 plaintiff wrote numerous letters to his Union and to Conrail complaining of seniority problems including his vacation scheduling. In February 1985, due to his own fault, he fell from a rail car, hitting his head and injuring his lower back. He was diagnosed

with a cerebral concussion and lumbar radiculopathy. Conrail began disciplinary proceedings against plaintiff for safety violations leading to the accident. There was no claim that Conrail was in anyway negligent resulting in plaintiff's accident.

Plaintiff first sought psychiatric help from Dr. James Frey on June 20, 1985 on referral from his family doctor. He told the psychiatrist that he couldn't sleep, was irritable, and had problems concentrating and communicating since his accident. He was also overwrought about loss of seniority.

He continued under psychiatric care until August 1987, when he was placed on medical leave due to severe depression. On September 27, 1988, he was found to be medically disqualified from work due to the depression and was separated from Conrail.

Prior to his medical disqualification from work, plaintiff did not tell his treating psychiatrist about the harassment that took place from 1985 to 1987, until a year after he left Conrail. There was no evidence that his supervisors or fellow employees knew that he was under psychiatric care; nor was there evidence they were aware of his fragile mental condition as it developed.

In closing argument, over defendant's objection, plaintiff's counsel projected plaintiff's future lost wages from age 39 to age 70 for a total of $767,884; and plaintiff's pain and suffering at $3.00 per day until age 70 for a total figure of $814,680. The jury returned a verdict for plaintiff in the amount of $500,000. Conrail's motions for directed verdicts, j.n.o.v. and a new trial were overruled.

We will address Assignments of Error I and II together as they relate to many of the same issues and are dispositive of this appeal.

> I. THE TRIAL COURT ERRED IN DENYING CONRAIL'S MOTION FOR DIRECTED VERDICT/MOTION JNOV ON PLAINTIFF'S CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.
> II. THE TRIAL COURT ERRED IN DENYING CONRAIL'S MOTION FOR DIRECTED VERDICT/MOTION JNOV ON THE ISSUE OF NEGLIGENCE.

We find that the controlling issues on appeal are whether plaintiff can maintain a negligent infliction of emotional distress claim under the FELA, and whether he proved railroad negligence required by the Act. Defendant's motions for a directed verdict and j.n.o.v. should have been granted.

Plaintiff claims that his emotional condition of depression resulted from a pattern of harassment by former Penn Central employees, who made his working life miserable. Whether this is a claim of intentional or negligent infliction of emotional injury is difficult to determine. In the absence of a bright line dividing these theories, a consideration of the history of these kind of claims is appropriate.

It has long been disputed whether employee claims for emotional injuries as the result of stressful working conditions are cognizable under the FELA. The United States Supreme Court last addressed this issue in Atchison, Topeka and Santa Fe Railway Co. v. Buell

(1987), 480 U.S. 557. The plaintiff in Buell, a carman, alleged that he had endured mental and emotional suffering at the hands of his foreman and fellow employees as a result of their harassment and intimidation. He claimed this conduct was condoned by the Sante Fe thereby depriving him of a safe place to work. The Supreme Court refused to rule on whether a cause of action for wholly emotional injuries lies under the FELA and stated that:

> The question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see Urie v. Thompson, 337 US, at 174, 93 L.Ed. 1282, 69 SCt 1018, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity.

Id. at 568.

The Court declined to decide the issue on the limited record presented by the railroad's motion for summary judgment. "As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." Id. at 570. Since Buell, the state of the law continues to be unsettled. However, the United States Supreme Court has recently granted certiorari in Gottshall v. Consolidated Rail Corp. (C.A. 3 1993), 988 F.2d 355 and in Carlisle v. Consolidated Rail Corp. (C.A. 3

1993), 990 F.2d 90. See Case No. 92-1956, 62 U.S.L.W. 3272, Oct. 12, 1993.

The Sixth Circuit Court of Appeals has declined to rule that as a matter of law a claim for negligent infliction of emotional distress states a cause of action under the FELA. Adams v. CSX Transportation, Inc. (C.A.6 1990), 899 F.2d 536, 539; Stoklosa v. Consolidated Rail Corp. (C.A.6 1988), 864 F.2d 425, 426. However, the Sixth Circuit has squarely held that intentional infliction of purely emotional injury is not cognizable under the FELA because the Act is limited to negligence claims.[1] Adkins v. Seaboard System R.R. 821 F.2d 340, 342 (C.A.6 1990); Antalek v. Norfolk & Western Co. (C.A.6 Aug. 30, 1984) No. 84-3057, unreported.

The failure of the United States Supreme Court and the Sixth Circuit Court of Appeals time and again to forthrightly declare that there is a cognizable FELA claim for infliction of emotional distress 1) gives this Court considerable pause in embracing such a principle and 2) leaves this Court no clear precedential landmarks for the determination of this case. This is all the more disconcerting because of the liberal construction given the Act in view of its remedial purposes and the recognition that an employee can recover under the FELA so long as the

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[1] 45 U.S.C. § 51 states: "Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence * * *."

employer's negligence "played any part, even the slightest in producing the injury or death for which damages are sought." Rogers v. Missouri Pac. R.R. Co. (1957), 352 U.S. 500, 506; Buell 480 U.S. at 562, n. 8.

Resort to other federal decisions is equally unavailing. As most recently stated in Gottshall v. Consolidated Rail Corp. (C.A.3 1993), 988 F.2d 355, 365:

> It is clear that there are open conflicts among the circuits. A review of the decision of other circuits in the wake of Buell indicates that there is no common discernable principle, test, view or attitude.

The Third Circuit went on to state that it has "refused to designate a particular common law test as the test in this circuit, choosing instead to take an ad hoc approach that focuses more on the facts rather than rules of law." Id. at 365.

"In 1906, Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injuries as a result of the negligence of their employer or their fellow employees." Buell, 480 U.S. at 561. State and federal courts have concurrent jurisdiction. 45 U.S.C. § 56. State courts adjudicating FELA actions must apply state procedural rules and federal substantive law. St. Louis Southwestern Ry. Co. v. Dickerson (1985), 470 U.S. 409, 411; Hancock v. Western Ry Co. (1987), 39 Ohio App.3d 77, 79.

The FELA supersedes both common law and any state law which relate to the liability of railroads for injury to their employees. The remedy afforded by this Act is exclusive of all others. Southern Buffalo R.R. v.

Ahern (1953), 344 U.S. 367; Erie R.R. v. Winfield (1917), 244 U.S. 170; Chicago, R.I. & P. Ry. v. Schendel (1926), 270 U.S. 611. Although the FELA is a negligence statute, the Act abolished the common law negligence defenses embodied in the fellow-servant rule and in the doctrine of assumption of risk. 45 U.S.C. §§ 51, 54. It also provides that contributory negligence on the part of an injured employee does not bar his recovery, but merely operates to diminish the amount of damages recoverable. 45 U.S.C. § 53.

Through recent years, a number of courts have held there can be no recovery for emotional distress under the FELA without some precipitating physical injury, actual or threatened. Ray v. Consolidated Rail Corp. (C.A.7 1991), 938 F.2d 704, 705; Adkins v. Seaboard System R.R. (C.A.6 1987), 821 F.2d 340, 341; Antalek v. Norfolk & Western Ry. (N.D. Ohio 1983), No. 82-427, aff'd (C.A.6 1984), 742 F.2d 1454; Lancaster v. Norfolk & Western Ry. (C.A.7 1985), 773 F.2d 807, 813; Ballard v. Central Vermont Ry. (C.A.1 1977), 565 F.2d 193; Finn v. Consolidated Rail Corp. (D.Mass.1985), 622 F.Supp. 41, aff'd on other grounds, 782 F.2d 13 (C.A.1 1986); Moody v. Maine Central R.R. (D. Maine 1985), 620 F.Supp. 1472, aff'd on other grounds, 823 F.2d 693 (C.A.1 1987); Sorley v. Consolidated Rail Corp. (S.D.N.Y.1984), 581 F.Supp. 642. Zimmerman v. Illinois Cent. Gulf R. Co. (1991), 220 Ill.App.3d 945, 581 N.E.2d 359, 361. Aside from the physical impact requirement, other courts have established a "zone of danger" test or permitted recovery where the plaintiff was a "bystander" who saw a relative injured or killed. These limiting doctrines "have been adopted due to the courts' suspicion that emotional distress claims are often subject

to fraud and exaggeration * * * [the courts] have repeatedly noted [their] concerns about the potential for a flood of litigation, unlimited damages and fraud arising from unrestrained emotional distress claims." Carlisle v. Consolidated Rail Corp. (1993), 990 F.2d 90, 94-95.

Given this background, we turn to the issues at hand. The gravamen of plaintiff's complaint is contained in ¶ 5 which alleges that Conrail:

> Negligently supervised and condoned the known conduct of plaintiff's superiors and fellow employees who in the process of making work assignments and in other work related associations, subjected plaintiff to torment, embarrassment, humiliation, frustration, harassment, inequity, ridicule and other severe emotional distress, because he was a former employee of the Erie Lackawanna Railroad.

Although his Complaint is couched in terms of negligence, it is also arguable that plaintiff's theory of the case implicated a knowing or deliberate intention to inflict injury. As noted, the Sixth Circuit has definitively stated in Adkins v. Seaboard Systems Railroad (C.A.6 1987), 821 F.2d 340, 342, that claims for the intentional infliction of emotional distress are not actionable under the FELA. Nevertheless, we shall address plaintiff's theory of negligence on which the case was tried and on which the jury was instructed.

We hold that plaintiff has not proven a cause of action for negligent infliction of emotional distress, even if one were available under the FELA. Plaintiff did not present any evidence of a physical injury to him caused by railroad negligence nor did he witness an accident

precipitating his emotional problems. His claim is therefore one for purely emotional distress. The Sixth Circuit has held that in order to prevail on a claim of this nature, if in fact it states a cause of action, plaintiff must "prove the traditional common law elements of negligence: duty, breach, foreseeability and causation." Adams v. CSX Transportation, Inc. (C.A.6 1990), 899 F.2d 536, 539.

In determining whether the railroad had breached its duty, the court in Adams found that "unconscionable abuse" was a prerequisite for recovery:

> The issue of whether defendant CSX breached its duty to provide plaintiff Adams with an emotionally safe workplace can be resolved by examining the Supreme Court's conception of impermissible harassment under FELA. In Buell the Court identified "unconscionable abuse" as "a prerequisite to recovery" for "purely emotional injury[.]" Buell 480 U.S. at 567 n. 13, 107 S.Ct. at 1417 n. 13. The Fifth Circuit utilized this language to define the type of conduct that amounts to a breach of the employer's duty to furnish an emotionally safe workplace. See Netto v. Amtrak, 863 F.2d 1210, 1215 (5th Cir.1989). We similarly hold that an employer has not breached its duty to provide an emotionally safe workplace unless the employer (acting through its agents) engages in "unconscionable abuse" of an employee. In this case, the evidence establishes that Peterson was extremely demanding and often abrasive, yet the plaintiff never lodged a complaint against him or opted to exercise his seniority to switch to a shift outside Peterson's supervision. Moreover, the evidence unequivocally indicates that Peterson's demands were related solely to job

> performance and were distributed evenly among all the workers under his direct supervision. While Peterson's conduct may have been overbearing, we cannot say that the magistrate erred in finding that "unconscionable abuse" of plaintiff Adams did not occur.

Id. at 539-40.

The Fourth Circuit Court of Appeals similarly requires plaintiff to show outrageous conduct as a predicate to a claim for negligent infliction of emotional distress under the FELA. Elliott v. Norfolk & Western Ry. Co. (C.A.4 1990), 910 F.2d 1224, 1229. The lower federal courts have followed these authorities in requiring unconscionable abuse or outrageous conduct to support a claim for emotional injury under the FELA. Rost v. National Railroad Passengers Corp. (E.D.Pa. Sept. 11, 1989), 1989 U.S.Dist.Ct.Lexis 10724; Visconti v. Consolidated Rail Corp. (S.D.N.Y.1992) 801 F.Supp. 1200, 1207-10; Cohen v. Metro-North Commuter Railroad Co. (S.D.N.Y.1991), 1991 WL 4699 and Gemmell v. Consolidated Rail Corp. (S.D. Ohio, April 12, 1991), Lexis No. 7107. See, also, Stoklosa v. McGill (Feb. 21, 1992), Lucas App. No. L-91-028, 1992 Ohio App. Lexis 728.

In attempting to define what constitutes "unconscionable abuse," it is also instructive to look at how those terms are defined under state law. Ohio has adopted Section 46(1) and (2) of the Restatement of Law 2d Torts (1965), and the comments thereafter as standards to be used in deciding emotional distress cases. Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369, 374. Comment (d) of the Restatement states as follows:

> * * * [It] has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous!'.
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to harden to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. * * * .

Followed in Reamsnyder v. Jaskolski (1984), 10 Ohio St.3d 150, 153; Ashcraft v. Mt. Sinai Medical Ctr. (1990), 68 Ohio App.3d 359, 366; Pyle v. Pyle (1983), 11 Ohio App.3d 31, 34.

We find that the rough conduct and locker-room humor of plaintiff's fellow railroad workers, even if malicious and unprovoked, failed to meet the threshold of "unconscionable abuse" or "outrageous conduct" required for the successful prosecution of his claim. The conduct displayed by the evidence might be viewed as "unconscionable" or "outrageous" in a more delicate setting but it is hardly unexpected or shocking in the railroad yard.

We are also mindful of the common law of Ohio on this score which does not permit a claim for negligent infliction of emotional distress in the employment situation. The United States Supreme Court has assumed, as we must, that "FELA jurisprudence gleans guidance from common law developments". Buell, 480 U.S. at 568. Taking that guidance, we reference Hatlestad v. Consolidated Rail Corp. (1991), 75 Ohio App.3d 184, 191, which holds:

> Finally, as to plaintiff's claim for negligent infliction of emotional distress, Ohio courts do not recognize a separate tort for negligent infliction of emotional distress in the employment context. Antalis v. Ohio Dept. of Commerce (1990), 68 Ohio App.3d 650, 589 N.E.2d 429. See, also, Tohline, supra, 48 Ohio App.3d at 284, 549 N.E.2d at 1228. Consequently, plaintiff may recover for emotional harm negligently inflicted by defendant only by bringing a "traditional" claim for negligent infliction of emotional distress, which requires plaintiff to show that he (1) was a bystander to an accident, (2) reasonably appreciated the peril thereof, and (3) suffered serious and foreseeable emotional distress as a result of his cognizance or fear of the peril. Paugh v. Hanks (1983), 6 Ohio St.3d 72, 6 OBR

> 114,-451 N.E.2d 759, paragraph three and four of the syllabus.

While we do not doubt the earnestness of the plaintiff's argument and his reasons for extending the tort to the employment arena, we find the language in Antalis v. Ohio Dept. of Commerce (1990), 68 Ohio App.3d 650, 654 compelling:

> While appellant argues that public policy requires the court to recognize a claim for negligent infliction of emotional distress in the work place as part of an employer's duty to provide a safe working environment, absent a clear expression of intent from the Ohio Supreme Court, we decline to expand the application of this tort to include actions arising out of an employment situation. Since there are no genuine issues as to any material fact and appellee was entitled to judgment as a matter of law, the trial court properly granted appellee's motion for summary judgment pursuant to Civ.R. 56(C).

We also find that plaintiff's proofs have failed to establish the essential elements of a claim for negligent infliction of emotional distress because it was not foreseeable, on the part of Conrail, that the prevailing work conditions would cause plaintiff's mental breakdown. "Reasonable foreseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." Gallick v. Baltimore & Ohio Railroad Co. (1963), 372 U.S. 108, 117; Green v. River Terminal Ry. Co. (C.A.6 1985), 763 F.2d 805, 808. Plaintiff claims he could not take his vacations when he wanted; that he would be assigned to different shops and yards on short notice; that he wasn't

sufficiently oriented on new sites or given safety equipment for his work; that he wasn't given a locker and changed clothes in his car; and his supervisor overrode his "bad car" orders. Some of these episodes were no doubt a product of his subordinate seniority, but did not, in any event, establish any negligence on behalf of Conrail. Ordinary job-related stress is not compensable under the FELA. Holliday v. Consolidated Rail Corp. (C.A.3 1990), 914 F.2d 421, 425. "[I]t appears at best, that this case involves a situation of hurt feelings and poor [work] relationships, not unconscionable abuse * * * Elliott v. Norfolk & Western Ry. Co. (C.A.4 1990), 910 F.2d 1224, 1230. As stated in Stoklosa v. Consolidated Rail Corp. (C.A.6 1988), 864 F.2d 425, 425-26 where summary judgment for the railroad was affirmed:

> The magistrate further concluded that Conrail's demotion of the plaintiff, while possibly contributing to his instability, did not constitute negligence actionable under FELA because Conrail had no awareness of plaintiff's vulnerable condition, and therefore could not reasonably foresee his injury. * * * .
> Indeed, such action taken by an employer is expected to cause distress and hurt feelings to the recipient employee. Plaintiff's extreme reaction, however, could not reasonably be foreseen. Any other disposition of this case would result in the possibility of extended litigation arising from every routine personnel decision.

In the aftermath of the Sixth Circuit's decision in Stoklosa, the plaintiff filed a legal malpractice action against his lawyer claiming that the failure to adequately discover against Conrail prevented plaintiff from proving

foreseeability. Stoklosa v. McGill (Feb. 21, 1992), Lucas App. No. L-91-028, unreported. There, the Sixth Appellate District Court of Appeals affirmed the grant of summary judgment and stated as follows (p. 12):

> Based upon the foregoing, reasonable minds can only conclude that defendant's discovery confirmed that plaintiff suffered from no actionable physical injury, thereby precluding a FELA-based intentional tort claim, as a matter of law. Reasonable minds, furthermore, can only conclude that defendant's discovery revealed that Contrail [sic] officials were not aware of plaintiff's mental fragility and that Conrail's treatment of plaintiff was not unconscionable, thereby precluding a FELA-based negligent infliction of emotional distress, as a matter of law. Plaintiff has failed to substantiate his claims to the contrary. Defendant's motion for summary judgment, therefore, is well-taken and granted.

Other recent FELA cases have held that the failure to prove "foreseeability" of an extreme reaction to the harsh conditions of railroad life (including harassment) bars recovery as a matter of law. Adams v. CSX Transp. Inc. (C.A.6 1990), 899 F.2d 536, 540; Robert v. Consolidated Rail Corp. (C.A.3 1987), 832 F.2d 3, 6; Handy v. Union Pacific Ry. Co. (Utah App.1992), 841 P.2d 1210, 1219-20.

Mindful of the Supreme Court's admonition in Buell, that "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand" 480 U.S. at 570, we address other facts in this case which support the conclusions we have reached.

A number of the episodes which plaintiff's evidence detailed (rat in the lunch box, sugar in the gas tank, name-calling, graffiti, anonymous phone calls, sexual taunting, isolated episodes of assault with the chipping hammer or a truck), were affronts to his person or sensibilities by fellow employees. Except for one episode of sexual taunting by a foreman, there is no evidence that Conrail's supervisors or foremen participated in the conduct or condoned it, if they ever knew it was going on. Many of these episodes were vague, anonymous or undated without identification of responsible railroad personnel. In any event, this kind of crude and occasionally cruel conduct is outside of the scope of employment and not in furtherance of railroad work to be performed. It is at least questionable whether the pranks or practical jokes of co-employees are attributable to railroad negligence since they are not within the scope of the employment. See Copeland v. St. Louis-San Francisco Railway Company (C.A.10 1961), 291 F.2d 119, 121 and cases cited therein. In Young v. N.Y. Cent. R. Co. (1949), 88 Ohio App. 352, paragraph four of syllabus, this court held:

> A railroad is not liable [in an FELA action] under the doctrine of respondeat superior for injuries sustained by the employee as the result of an unprovoked assault by a fellow employee which was not committed in furtherance of the employer's business.

Although there was sufficient medical evidence to establish that plaintiff was suffering from chronic and disabling depression, and we do not intend in any way to minimize the severity of his condition, the timing of this

evidence left considerable doubt that his mental instability was proximately caused by the ex post facto evidence of harassment which he detailed.

The testimony given by Dr. James Fry, plaintiff's treating psychiatrist, did not relate the alleged harassment to his diagnosis. Dr. Fry testified as follows:

> Q. When did you first see Larry Vance and under what circumstances?
>
> A. His initial visit was on June 20, 1985, and at that time Larry told me that he had been referred to me by his family doctor, who was a Dr. Song, and Larry went on to say that he had been depressed, that he had lost 30 pounds in weight during the past year, year and a half; that he was frequently tearful, felt restless and agitated, had difficulty sleeping, and was very concerned about work. He went on to say that there had been a change sometime previously, a merger, I guess of the railroads, and with this merger, it had changed his working conditions. He would frequently be assigned at different locations on what he felt was rather short notice. And I felt that he was depressed to the point where I felt his life was in danger by his own hand. (Tr. 194-195).

Dr. Fry went on to testify that although he began treating Vance for deep depression with suicidal tendencies in 1985 and was still treating him at the time of trial, his office notes contain no reference to the alleged harassment. Dr. Fry recalls, however, that Vance mentioned two incidents to him, – the rat in his lunch box, and sugar in the gas tank. But the doctor was not informed about these incidents, until 1988, one year after he had disqualified

Vance from working at Conrail and three years after he started treating him.

Dr. Fry also wrote three medical opinion letters relative to Vance's medical condition (Feb. 4, 1986; Sept. 7, 1988, Sept. 27, 1988), the last two written more than a year after Vance last worked for Conrail. These opinions made no mention of harassment as a reason for his depression or his disqualification from work.

We also note that the individual episodes of harassment upon which plaintiff relies did not occur until after 1985, some not until 1987 (rat in the lunch box; sugar in the gas tank), and timewise shed doubt on plaintiff's claim that his disabling depression was a result of the harassment. Even his wife testified that he was a normal loving husband and father until 1985 which was when he fell from a box car, suffered a concussion and back injury and had a subsequent personality change. There was no claim that railroad negligence caused or contributed to his accident. Lingering bitterness over losing his seniority due to the merger also exacerbated his mental condition as his psychiatrist noted.

Finally, we observe that the FELA has existed since 1906, but Congress has not amended the Act to clearly provide recovery for negligent infliction of emotional distress. This is so despite the fact that the issue has been repeatedly and divergently addressed by the courts for many years and the United States Supreme Court heretofore has declined to squarely address the issue. In viewing Ohio's Workers' Compensation Act, the Ohio Supreme Court has recently had occasion to discuss an

analogous point in Rambaldo v. Accurate Die Casting (1992), 65 Ohio St.3d 281, syllabus:

> In the absence of clearly expressed legislative intent to recognize mental conditions caused solely by work-related stress as occupational diseases within the purview of the Workers' Compensation Act, such mental conditions are not compensable as occupational diseases.

Based on the foregoing discussion, we find that plaintiff's proof failed to sustain a FELA claim for negligent infliction of emotional harm. He has shown neither "unconscionable abuse" nor "outrageous conduct" as those terms are legally defined and has failed to show that Conrail should have reasonably foreseen his extreme reaction to railroad yard harassment. Defendant's motion for a directed verdict and judgment notwithstanding the verdict should have been granted.

Assignments of Error I and II are sustained.

III. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR DIRECTED VERDICT ON THE BASIS THAT PLAINTIFF FAILED TO PLEAD A SPECIFIC AMOUNT OF MONETARY DAMAGES IN HIS COMPLAINT.
IV. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT/MOTION JNOV ON THE STATUTE OF LIMITATIONS.
V. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL TESTIMONY FROM PLAINTIFF'S FELLOW EMPLOYEES.
VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CHARGE

THE JURY THAT ANY AWARD TO PLAINTIFF IS NOT SUBJECT TO INCOME TAX.
VII. THE TRIAL COURT ERRED IN PERMITTING EVIDENCE OF PLAINTIFF'S FUTURE LOST WAGES.

In view of our disposition of Assignments of Error I and II, these assignments of error are moot. App.R. 12(A)(1)(c).

Judgment reversed and vacated; judgment for defendant.

MATIA, J., concurs.

NAHRA, P.J. dissents.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

NAHRA, Presiding Judge, dissenting:

I must respectfully dissent from the majority opinion in its disposition of this appeal. It is my conclusion plaintiff's cause of action for emotional distress is available under the FELA and that his evidence was sufficient to present a jury question on the issue. I base that conclusion upon the plain language of 45 U.S.C. § 51 and the United States Supreme Court cases which have construed this act, upon a close reading of the United States Supreme Court's opinion in Atchinson, Topeka and Santa

Fe Railway Co. v. Buell (1987), 480 U.S. 557, and upon the evidence plaintiff presented in the trial court.

45 U.S.C. § 51 states in pertinent part:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . . (Emphasis added.)

It is correctly pointed out that this act has been liberally construed in view of its remedial purpose. Moreover, the FELA supercedes both common law and any state law which relate to the liability of railroads for injury to their employees. Chicago, R. I. & P. Ry. v. Schendel (1926), 270 U.S. 611. The act has changed and modified common law with respect to the duties owed by this type of employer to its employees. Rogers v. Missouri Pacific R.R. (1957), 352 U.S. 500.

Furthermore, it has been held that determination of negligence under this act is a matter of federal rather than state law. Id., see, also, Urie v. Thompson (1949), 337 U.S. 163; Nivens v. St.L. Southwestern Ry. (C.A.5, 1970), 425 F.2d 114, cert. denied, 400 U.S. 879. A case should go to the jury if a reasonable jury could find that the railroad's negligence played "any part, even the slightest, in producing the injury." Rogers v. Missouri Pacific R.R. Co., supra; Masiello v. Metro-North Commuter R.R. (S.D.N.Y.1990), 748 F.Supp. 199.

In Buell, supra, a case factually similar to this one, the United States Supreme Court stated in pertinent part as follows:

> The coverage of the statute is defined in broad language, [Footnote omitted.] which has been construed even more broadly. We have recognized generally that the FELA is a broad remedial statute, and have adopted a "standard of liberal construction in order to accomplish [Congress'] objects." Urie v. Thompson, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030, 93 L.Ed. 1282 (1949).
>
> * * *
>
> Because they fear that many workers alleging emotional injuries are really complaining of unhappiness arising out of everyday workplace disputes, [petitioner railroad and various amici] ask us to hold that the [Railway Labor Act] provides the exclusive remedy for this ill-defined class of injuries. Even if we were to find some authority allowing us to rewrite the FELA in this manner, we are not persuaded that it would be appropriate to do so. There is no basis for assuming that allowing FELA actions for emotional injury will wreak havoc with the general scheme of RLA arbitration, [Footnote omitted.] and absent an intolerable conflict between the two statutes, we are unwilling to read the RLA as repealing any part of the FELA. See Morton v. Mancari, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974). Although we do not decide today whether purely emotional injuries are cognizable under the FELA, we stress that it is the FELA that controls that inquiry * * * *

* * *

> [B]ecause of the posture in which this case comes before us, the record has never been developed on the exact nature of the allegedly tortious activity, or the extent of the injuries that respondent claims to have suffered.

* * *

> The question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common-law developments, see Urie v. Thompson, 337 U.S., at 174, 69 S.Ct., at 1026, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity.

* * *

> In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

(Emphasis added.)

In two footnotes to this opinion, the court in Buell appeared to adopt the following: 1) the "unconscionable abuse" test (footnote 13); and a less stringently applied standard if the plaintiff presents facts which demonstrate

he suffered some physical injury as a result of the railroad's actions (footnote 22). See, also, Adams v. CSX Transportation, Inc. (C.A.6, 1990), 899 F.2d 536, 540.

The court in Adams, supra, determined the employee did not demonstrate "unconscionable abuse" because the railroad supervisor's demands and abrasiveness "were related solely to job performance."

In this case, however, as the majority acknowledges in its list on page 2 of the opinion, appellee produced evidence of a continuing and pervasive harassment by fellow employees which went far beyond what one is normally expected to endure in performing his employment responsibilities. Indeed, such conduct by appellee's employees qualified as being "outrageous." Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369.

Furthermore, in view of the fact that the evidence proved the other employees' conduct was extreme and not mere "locker-room humor," it begs the question to state, as the majority opinion apparently does, that 1) appellant may be legally absolved from liability because appellee apparently did not personally complain about the harassment; 2) it was not reasonably foreseeable that such conduct could cause emotional disturbance; and 3) such conduct went beyond the scope of employment.

The evidence demonstrated that appellant was fully aware of the animosity between the two groups of employees. It also demonstrated that the type of harassment did not simply relate merely to "prevailing work conditions" of "poor [work] relationships" which led only to "hurt feelings." See, e.g., Elliott v. Norfolk & Western Ry. Co. (C.A.4, 1990), 910 F.2d 1224, 1230;

Stoklosa v. Consolidated Rail Corp. (C.A.6, 1988), 864 F.2d 425, 426. Moreover, despite the majority's assertion to the contrary, the evidence demonstrated some of the more dangerous incidents of harassment, such as refusing to furnish appellee with safety equipment, were plainly committed within the scope of employment.

A review of the case law as applied to the facts of this case, including "nature of the injury and the character of the tortious activity," Buell, supra, thus leads to the conclusion appellant's motions for directed verdict and judgment notwithstanding the verdict were correctly overruled by the trial court. Rogers v. Missouri Pacific R.R., supra; Urie v. Thompson, supra; Masiello v. Metro-North Commuter R.R., supra.

Accordingly, I would overrule appellant's first two assignments of error and proceed to address the remaining ones as this court is required to do pursuant to App.R. 12(A).

CASE NO. 183406 ASSIGNED JUDGE /s/ Illegible

Larry D. Vance VS Consolidated Rail Corp.

[ ] PARTIAL

[ ] FINAL

[X] POST CARD

(Filed April 30, 1992)

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DATE 4/28/92

(NUNC PRO TUNC ENTRY AS OF & FOR __/___/___

Defendants motion for new trial and/or for judgment NOV is in both respects, overruled

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JUDGE